

7/6/90
9:00 AM

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

) Civil Action
) No. H-79-556
) Third-Party
) Complaint

MIDWEST SOLVENT RECOVERY INC.;
MIDWEST INDUSTRIAL WASTE DISPOSAL
COMPANY, INC.; INDUSTRIAL TECTONICS,
INC.; V & E CORPORATION; ERNEST DE
HART; EDWARD D. CONLEY; HELGA C.
CONLEY; LOVIE DE HART; CHARLES A.
LICHT; DAVID E. LICHT; DELORES LICHT;
EUGENE KLISIAK; JEANETTE KLISIAK;
LUTHER G. BLOOMBERG; ROBERT J. DAW-
SON, JR.; JOHN MILETICH; MARY
MILETICH; PENN CENTRAL CORPORATION;
INSILCO CORPORATION; RUST-OLEUM, INC.;
ZENITH RADIO CORPORATION; STANDARD T
CHEMICAL COMPANY, INC.; AMERICAN CAN
COMPANY, INC.; PRE FINISH METALS, INC.;
PREMIER COATINGS, INC.; MOTOROLA, INC.;
and DESOTO, INC.;

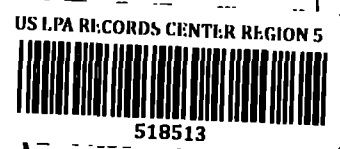
Defendants.

AMERICAN CAN COMPANY, INC.,
DESOTO, INC., INSILCO CORPORATION,
MOTOROLA, INC., PRE FINISH METALS,
INC., PREMIER COATINGS, INC.,
RUST-OLEUM, INC., STANDARD T
CHEMICAL COMPANY, INC.,
ZENITH RADIO CORPORATION, JOHN
MILETICH, MARY MILETICH and THE
PENN CENTRAL CORPORATION,

Third-Party Plaintiffs,

vs.

ACCUTRONICS, ACTIVE SERVICE CORP.,
AMERICAN NAMEPLATE & DECORATING CO.,



1	AMERICAN PRINTER & LITHOGRAPHER CO.,)
	AMERICAN RIVET COMPANY, APECO,)
2	APPROVED INDUSTRIAL REMOVAL, INC.,)
	ARMOUR PHARMACEUTICAL, ARTISAN HAND)
3	PRINTS, ASHLAND CHEMICAL CO.,)
	AVENUE TOWING COMPANY, BARR &)
4	MILES, INC., BELDEN ELECTRICAL)
	PRODUCTS DIV. OF COOPER INDUSTRIES,)
5	INC., BRETFORD MANUFACTURING, INC.,)
	BUTLER SPECIALTY COMPANY, INC.,)
6	BY PRODUCTS MANAGEMENT, CALUMET)
	CONTAINER, CARGILL, INC.,)
7	CHEMALLOY DIVISION OF FISHER- CALO)
	CHEMICAL CO., CHICAGO ETCHING CORP.,)
8	CHICAGO NAMEPLATE COMPANY,)
	CHICAGO ROTOPRINT CO.,)
9	C & C INDUSTRIAL MAINTENANCE CORP.,)
	CITY OF GARY, INDIANA, C.P. CLARE)
10	DIVISION OF GENERAL INSTRUMENTS)
	CORP., C.P. HALL CO.,)
11	C.P. INORGANICS, COMMANDER PACKAGING,)
	CONNOR FOREST INDUSTRIES, CONSERVA-)
12	TION CHEMICAL, CONSUMERS PAINT)
	FACTORY, INC., CONTINENTAL)
13	WHITE CAP DIVISION OF CONTINENTAL)
	CAN COMPANY, CONVERSIONS BY GERRING,)
14	COUNTY OF DU PAGE, ILLINOIS,)
	CRONAME, INC., CROWN CORK & SEAL)
15	CO., INC., CULLIGAN INTERNATIONAL)
	COMPANY, CULLIGAN WATER CON-)
16	DITIONING, INC., FRANK J. CURRAN,)
	CUSTOM METALS PROCESSING,)
17	DAP, INC. OF BEECHAM COSMETICS,)
	DAUBERT CHEMICAL COMPANY,)
18	DEUBLIN COMPANY, DOBSON CONSTRUCTION)
	INC., DUO FAST CORPORATION, DU-TONE)
19	CORP., HAROLD EGAN, EKCO HOUSEWARE)
	CO., EL-PAC, INC., EMBOSOGRAPH DIS-)
20	PLAY MFG. CO., ESS KAY ENAMELING, INC.,)
	ETHICON, INC., FELT PRODUCTS MFG. CO.,)
21	FLINT INK CORP., FURNAS ELECTRIC)
	CO., GEARMASTER DIVISION, EMERSON)
22	ELECTRIC, THE GILBERT & BENNETT)
	MFG. CO., GLD LIQUID DISPOSAL,)
23	HENRY PRATT COMPANY, J.M. HUBER)
	CORPORATION, HYDRITE CHEMICAL CO.,)
24	INTAGLIO CYLINDER SERVICE, INC.,)

1	JOHNSON & JOHNSON, J & S TIN MILL)
	PRODUCTS, KNAACK MFG. CO., LANSING)
2	SERVICE CORPORATION, LAUTTER)
	CHEMICAL, LIQUID DYNAMICS,)
3	LIQUID WASTE, INCORPORATED,)
	STEVE MARTEL, MASONITE CORPO-)
4	RATION, MCWHARTER CHEMICAL CO.,)
	METAL RECLAIMING CORPORATION,)
5	METROPOLITAN CIRCUITS,)
	MIDWEST RECYCLING COMPANY, MONTGOMERY)
6	TANK LINES, MORTON THIOKOL INC.,)
	MR. FRANK, INC., NAMSCO, INC.,)
7	NATIONAL CAN CORPORATION, NAZ-DAR CO.,)
	NUCLEAR DATA, INC., PPG INDUSTRIES,)
8	INC., PASLODE COMPANY, PIERCE & STEVENS))
	CHEMICAL CORP., PIONEER PAINT PRODUCTS,)
9	PREMIER PAINT CO., PYLE-NATIONAL CO.,)
	R-LITE, REFLECTOR HARDWARE CORP.,)
10	REGAL TUBE, RELIANCE UNIVERSAL, INC.,)
	RICHARDSON GRAPHICS, JOHN ROSCO,)
11	ROZEMA INDUSTRIAL WASTE, ST. CHARLES)
	MANUFACTURING, SCHOLLE CORPORATION,)
12	SCRAP HAULERS, SHERWIN WILLIAMS)
	COMPANY, SHELD COATINGS, INC.,)
13	SIZE CONTROL COMPANY, SKIL CORPORA-)
	TION, SPECIAL COATINGS CO.,)
14	SOUTHERN CALIFORNIA CHEMICAL,)
	SPECIALTY COATINGS, INC.,)
15	SPOTNAILS, INC., STAR TRUCKING, STERN)
	ELECTRONICS, INC., JOE STRAUSNICK,)
16	STUART CHEMICAL & PLANT, INC.,)
	SUMMER & MACE, SUN CHEMICAL,)
17	SYNTECH WASTE TREATMENT CENTER,)
	T.R.C., TEEPACK, INC., ALFRED TENNY,)
18	THIELE-ENGDAHL, INC., THOMPSON)
	CHEMICALS, TIFFT CHEMICALS,)
19	TOUNEY DISPOSAL, TRIPLE S. ETCHANTS,)
	UNIROYAL, INC., UNITED RESIN AD-)
20	HESIVES, INC., U.S. ENVELOPE, U.S.)
	SCRAP AND DRUM, U.S. STEEL CORP., UNI-)
21	VERSAL RESEARCH LABORATORIES, INC.,)
	UNIVERSAL TOOL & STAMPING COMPANY,)
22	VANDER MOULEN DISPOSAL, VELSICOL)
	CHEMICAL CORP., VICTOR GASKET)
23	DIVISION OF DANA CORPORATION,)
	WARNER ELECTRIC BRAKE & CLUCH CO.,)
24	WARWICK CHEMICAL, WASTE RESEARCH &)

1 RECYCLING, XEROX CORPORATION, and)
2 other unidentified persons,)

3 Third-Party Defendants.)
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9 DEPOSITION OF
10 RICHARD F. BOICE

11 July 6, 1990
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The continued deposition of RICHARD EDWIN BOICE, called for examination by the Defendants, pursuant to notice and pursuant to the provisions of the Federal Rules of Civil Procedure of the United States District Courts, pertaining to the taking of depositions for the purpose of discovery, taken before Arnold N. Goldstine, a Notary Public and Certified Shorthand Reporter within and for the County of Cook and State of Illinois, at 227 West Monroe Street, on July 6, 1990, commencing at the hour of 9:00 o'clock a.m.

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12 Chicago, Illinois 60603

13 appeared on behalf of
14 Pre Finish Metals, Inc.;

15 Mr. Jeffrey C. Fort
16 Ms. Lisa Anderson
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American Can Company, Inc.;

1 APPEARANCES (CONTINUED):
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4 Mr. John R. Adams
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15 appeared on behalf of Third-party
16 Defendant By Products Management;

17
18
19 Mr. Blanton
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23 Indianapolis, Indiana 46282

24 appeared on behalf of
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I N D E X

WITNESS:

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RICHARD BOICE

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E X H I B I T S

Boice Deposition Nos.

43 and 44	845
45	873
46 and 47	875
48 and 49	910

1 RICHARD BOICE

2 having been previously duly sworn,
3 was examined and testified further as follows:

4 DIRECT EXAMINATION

5 BY MR. OLIAN:

6 Q. Mr. Boice, I am going to be inquiring
7 as to the matters set forth in the 30 (b) 6
8 notice sent by Pre Finish Metals and I would
9 just like to go through the requests with you.

10 First of all, are there any documents
11 that the Agency has relating to the matters
12 contained in our 30 (b) 6 notice that are not
13 contained in the administrative record to your
14 knowledge?

15 If you would like to look at a copy of
16 the notice.

17 MR. TENENBAUM: Is this yours?

18 I don't know what this is. I just saw
19 it lying there.

20 MR. OLIAN: It is just left from yesterday.
21 Thanks.

22 MR. TENENBAUM: Could you read back the
23 question?

24 (The record was read.)

1 Okay.

2 As you know, we have filed objections
3 to some of the designation requests. In
4 particular, with respect to paragraph 1, we have
5 indicated our objection to discovery which is to
6 a large extent based on the documents and other
7 information provided by third parties.

8 And I don't think it is a fair question
9 to ask the witness whether or not all the mass
10 of documents produced in this litigation or
11 depositions and so on, whether or not various of
12 them are in the record or not.

13 I don't know if that is what you are
14 focusing on, but I don't think that is a fair
15 question to ask the witness. I would object to
16 it.

17 As to the other, do you want to deal
18 with that one or do you want me to go through
19 the other?

20 MR. OLIAN: Let's go through them all.

21 MR. TENENBAUM: As to the other ones, we
22 stated our objection to these.

23 Again on paragraph 2 and 3, it is a
24 very general request which we found ambiguous,

1 and I might add that we are waiting an
2 explanation from Pre Finish Metals and other
3 defendants as to the basis for any defense that
4 they are alleging relating to these, if they are
5 alleging such a defense.

6 We have not received any information
7 from any of the defendants on that. And without
8 such information it is pretty hard to evaluate
9 what documents might be relating to that, if
10 any.

11 As to the fourth. Again, I have gone
12 back to the second and third, it is not clear at
13 all to me what these are going after, as we
14 stated in our objections.

15 They may be going after remedy
16 selection issues, in which case we have stated
17 our usual discovery into remedy selection issues
18 objections.

19 On item 4, it seems to have two parts
20 to it or might have two parts to it. One is all
21 facts or information as to whether Pre Finish
22 Metals failed or refused to comply with the
23 United States Section 106 orders. Then there is
24 tagged on to the end, without sufficient cause

1 on that one.

2 The first part of that the witness can
3 certainly answer your questions.

4 As to the second part, I think that is
5 asking the witness to prove a negative. And we
6 have sought to find out from Pre Finish and the
7 other defendants what such cause or causes they
8 are alleging and we haven't been told.

9 We can't prove a negative.

10 MR. OLIAN: Okay.

11 Q. Then, Mr. Boice, I guess with respect
12 to the one question that counsel has not
13 objected to and sought protection from the court
14 on:

15 Are you aware of any documents that go
16 to the issue as to whether Pre Finish Metals,
17 Inc. failed or refused to comply with the
18 Section 106 orders that are not contained in the
19 administrative records?

20 A. Would you repeat the question?

21 Q. Do you have any documents that go to
22 the issue as to whether or not Pre Finish Metals
23 failed or refused to comply with the Section 106
24 orders that are not contained in the various

1 administrative records?

2 A. Yes.

3 Q. And what are those, have you brought
4 those documents with you today?

5 A. No, I don't think we did.

6 Those documents are your response to
7 our unilateral administrative order. I think
8 the letter was dated December 29, 1989.

9 And then there were subsequent letters
10 in January and some even came in February. I'm
11 not sure whether it was from Pre Finish Metals
12 or not.

13 Q. Other than letters sent by Pre Finish
14 or other defendants, are there other documents
15 aside from what is contained in the order that
16 go to this issue to your knowledge?

17 A. All that I know is documents filed in
18 court.

19 Q. Okay.

20 Counsel has based his objection in at
21 least in part on questions 2 and 3 as going to
22 remedy selection issues.

23 What I am trying to get at here is
24 whether the Agency relied on anything that is

1 not contained in the administrative record in
2 reaching its decision as to either the remedy or
3 the issuance of the orders with respect to Pre
4 Finish Metals?

5 A. No.

6 Q. Does the Agency have any specific
7 information or facts as to whether materials
8 that Pre Finish sent are directly found at the
9 site?

10 Let me clarify that. We sent a
11 substance that is a hazardous substance and is
12 found at the site.

13 Is there any information that links
14 what is found at the site specifically to drums
15 sent by Pre Finish other than what is contained
16 in the record?

17 MR. TENENBAUM: Are you including all the
18 litigation documents in this case?

19 MR. OLIAN: Yes.

20 What do you mean by the litigation
21 documents?

22 MR. TENENBAUM: Deposition transcripts and
23 interrogatory answers.

24 MR. OLIAN: Yes.

1 I understand the government's position
2 that to prove causation all they have to show is
3 we sent a substance to the site and that
4 substance was found at the site.

5 What I am asking is whether you have
6 any information beyond that that specifically
7 links the specific drums Pre Finish sent to a
8 particular part of the site.

9 Q. Did you find drums with Pre Finish's
10 name on them somewhere at the site?

11 A. Our liability evidence includes the
12 responses to the 104 E requests, the responses
13 to USEPA's interrogatories, responses to
14 requests for admission.

15 The production of documents by the
16 respondents, by the defendants. Permits and
17 permit applications. The Dehart and Intec
18 shipping documents, and other documents.

19 Q. Other than documents and deposition
20 transcripts and the like, was there any physical
21 evidence at the site that would link Pre
22 Finish's wastes or the substances sent there
23 directly to any contamination found at the site?

24 A. Well, in a sense in that --

1 Well, I have to look at the what we
2 know about your wastes. But, I think that some
3 of the hazardous constituents that were in your
4 waste were also detected at the site in the
5 remedial investigation results and in the other
6 results, testing results.

7 Q. Okay.

8 Aside from the commonality of the
9 substances we sent and the substances found, is
10 there any evidence that the substances found at
11 the site came specifically from the drums that
12 we sent to the site?

13 A. For example, if there was a drum that
14 said this is from Pre Finish Metals and we saw
15 someone pouring it on to the site?

16 Q. Yes.

17 Or you found a drum with our name on it
18 with a hole in the bottom, and a pile of
19 material sitting around the base of the drum.
20 Something like that.

21 A. I don't know of any evidence like that.

22 Q. Okay.

23 Does EPA have any facts or information
24 as to whether drums that Pre Finish sent to the

1 site, sent to Midco I specifically, were
2 trans-shipped to Midco II?

3 MR. TENENBAUM: Objection, vague.

4 MR. OLIAN: Pardon?

5 MR. TENENBAUM: Vague. He can answer, if he
6 can.

7 A. Well, in a sense that we though Pre
8 Finish Metals' wastes were transported and
9 placed at the Midco I site. And we know that
10 there were trans-shipments from the Midco I site
11 to the Midco II site based on depositions,
12 depositional testimony.

13 BY MR. OLIAN:

14 Q. Okay.

15 Do you know whether Pre Finish's drums
16 having been sent to Midco I, whether our
17 specific drums happened to be among those
18 trans-shipped to Midco II?

19 A. You mean do we know there was some
20 drums that said this is from Pre Finish Metals
21 and they put it -- somebody said they put it in
22 a container and took it to Midco II?

23 Q. Yes.

24 A. I don't know of any information.

1 Q. Okay.

2 Subject to the resolution of counsel's
3 objections to our other requests, I am finished.
4 Thank you.

5 DIRECT EXAMINATION

6 BY MR. FORT:

7 O. Mr. Boice, my name is Jeff Fort and I
8 represent Desoto. I would like to continue in
9 the same vein as Mr. Olian in terms of asking
10 questions specifically relating to liability
11 issues concerning Desoto.

12 I would point out at the outset that
13 until the court resolves these pending issues,
14 or until counsel for the government changes his
15 position on what things he will direct you not
16 to answer, I am going to try to avoid areas that
17 will evoke that sort of continued dispute and
18 focus on those areas that we can go through,
19 hopefully expeditiously.

20 Mr. Boice, directing your attention to
21 the consideration of any liability information
22 for Desoto.

23 Do you have any firsthand knowledge
24 that Desoto arranged for treatment or disposal

1 of hazardous substances at either of the Midco
2 sites?

3 MR. TENENBAUM: What do you mean by
4 firsthand knowledge?

5 MR. FORT: Does he have direct firsthand
6 knowledge, prescient information, either in the
7 form of seeing a drum with a Desoto label at the
8 site, seeing drums shipped from the Desoto plant
9 to the site, or other direct firsthand
10 knowledge.

11 I want to set aside for the moment any
12 review of deposition transcript, documents,
13 things of that nature.

14 A. In other words, was I an eye witness?

15 Q. Exactly.

16 A. No.

17 Q. Okay.

18 Other than reviewing the deposition
19 transcripts, documents provided by the site
20 operators, documents provided by other third
21 parties, 104 E responses, things of that nature.

22 Do you have anything else that you
23 would consider firsthand information that Desoto
24 waste materials of hazardous substances were

1 disposed of at the site?

2 A. I thought you just said that those
3 weren't firsthand information sources.

4 Q. Exactly. I just want to make sure of
5 it. I want to see if there is anything else
6 that you would consider direct firsthand
7 knowledge other than those things.

8 MR. TENENBAUM: By him?

9 MR. FORT: Yes, by him. Just this witness'
10 knowledge.

11 A. No.

12 O. Okay.

13 Now, can you describe for me generally
14 what information are you aware of that Desoto
15 arranged for the treatment or disposal of
16 hazardous substances at either of the Midco
17 sites?

18 A. Well, we have --

19 MR. TENENBAUM: Let me just for the record
20 again restate my objection to the request for
21 designation and testimony on the area of
22 production by third-parties and so on.

23 But, you can go ahead and answer.

24 A. As we stated regarding the other

1 generators, there is the Dehart and Intec
2 documents, which includes shipping, various
3 shipping documents, such as pickup tickets,
4 invoices, memos, check receipts, a number of
5 other types of documents, and the Midco log.

6 And there was responses to 104 E
7 requests, responses to interrogatories,
8 responses to production of documents, responses
9 to requests for admissions. Depositions,
10 interviews, and permits, and permit
11 applications.

12 BY MR. FORT:

13 Q. Okay.

14 Is that a general answer for all
15 defendants here, or is that an answer
16 specifically on Desoto?

17 A. I think that applies to all the
18 generators.

19 Q. Okay.

20 Well, do you know if there was any
21 permit application information that relates to
22 Desoto waste materials going to the site?

23 A. I don't know about that.

24 Q. Okay.

1 How about interviews that dealt
2 specifically with Desoto waste materials going
3 to the site?

4 A. I would have to read the interview.

5 Q. Okay.

6 What interviews are you thinking about,
7 is that the Crouch interview that we talked
8 about last time?

9 A. As far as I know, that's the only one.

10 Q. That's the only one you are aware of,
11 the Crouch interview?

12 A. Yes.

13 Q. Okay.

14 In terms of answers to interrogatories,
15 requests for admission, things of that nature,
16 do you recall any information specific to Desoto
17 that indicated Desoto waste materials were in
18 fact disposed of at the sites, either of the
19 sites?

20 MR. TENENBAUM: I am going to have to object
21 to that. You can read your own interrogatory
22 answers, requests for admissions, as well as the
23 witness can.

24 I don't think it is fair to ask if he

1 can memorize or remember, if he is ever read
2 them.

3 MR. FORT: I don't know if he did, counsel.
4 But, if he did, he can say. If he did or not,
5 if he can't recall, he can't recall. I am
6 asking for his recollection.

7 MR. TENENBAUM: I have my objection
8 reiterated.

9 A. I can't recall.

10 BY MR. FORT:

11 Q. Okay.

12 Do you recall anything specific in a
13 104 E response, either of Desoto or anybody
14 else, that would indicate that Desoto waste
15 materials were, in fact, disposed of at the
16 site?

17 A. Yes.

18 Q. Okay.

19 And what do you recall in terms of that
20 104 E, was that a response by Desoto on the 104
21 E that you are recalling?

22 A. Yes.

23 Q. Anybody else's that indicated Desoto
24 had, in fact, disposed of wastes at the site, on

1 a 104 E response?

2 A. Not as far as I can remember.

3 Q. Okay.

4 How about the Midco log, is there
5 specific information there on Desoto?

6 A. Yes.

7 Q. Okay.

8 How about the Dehart and Intec
9 documents?

10 A. Yes.

11 Q. Okay.

12 Now, in any of these documents that you
13 can specifically recall, the Dehart or Intec
14 documents, the Midco log, the 104 E response of
15 Desoto, was there specific information as to
16 specific hazardous substances or constituents
17 within the waste material?

18 MR. TENENBAUM: Same objection.

19 I don't see why we can't show the
20 witness the documents rather than testing his
21 memory, when he doesn't even have firsthand
22 knowledge.

23 MR. FORT: If he can not recall, we can
24 refresh his recollection. But, I am just trying

1 to get an understanding of this witness'
2 recollection.

3 MR. TENENBAUM: It is up to you. You
4 already established that the witness doesn't
5 have firsthand knowledge, so I'm not sure that
6 is relevant or calculated to lead to admissible
7 evidence as to whether he can remember something
8 he learned from third parties, through a
9 question of litigation or 104 E responses or so
10 on.

11 The witness can try and answer.

12 A. As far as I can remember, the 104 E
13 request or response includes information on
14 hazardous wastes that were disposed of at the
15 site.

16 BY MR. FORT:

17 Q. Okay.

18 How about the Midco log?

19 A. No.

20 Q. And the Dehart documents?

21 A. I would have to review those.

22 Q. How about the Intec documents?

23 A. I would have to review those.

24 Q. Do you recall the types of substances

1 that were indicated to be present in the 104 E
2 response of Desoto?

3 MR. TENENBAUM: Same objection.

4 A. No.

5 BY MR. FORT:

6 Q. Okay.

7 Do you have any general knowledge of
8 the types of waste materials that Desoto might
9 have sent to the site?

10 A. Do I have any what?

11 Q. General knowledge as to the types of
12 waste materials that might have been sent to the
13 site, either because you know what the
14 manufacturing operation was or you have looked
15 at any other data?

16 MR. TENENBAUM: Same objection.

17 A. Just from reading the documents I
18 stated before.

19 BY MR. FORT:

20 Q. Okay.

21 A. Now that you mention it, it mentioned
22 xylene I think and toluene in those documents,
23 resins, various acrylic resins and various
24 chemicals that are used in the production of

1 resins. And said that the resin would solidify
2 and encapsulate the solvents.

3 Q. Okay.

4 As to the acrylic resins, are those
5 hazardous substances?

6 MR. TENENBAUM: Objection. Calls -- may
7 call for a legal conclusion, may seek expert
8 testimony.

9 A. I don't know.

10 BY MR. FORT:

11 Q. You don't know?

12 A. No.

13 Q. Okay.

14 How about the these other chemicals, I
15 want to leave xylene and toluene, the specific
16 ones you mentioned, for the end.

17 What about these other chemicals, do
18 you have a view on whether or not those are
19 hazardous substances?

20 MR. TENENBAUM: Same objection.

21 A. Which chemicals?

22 BY MR. FORT:

23 Q. Well, if you can be specific, let's go
24 to xylene. Is that a hazardous substance to

1 your knowledge?

2 MR. TENENBAUM: Same objection.

3 A. Yes.

4 BY MR. FORT:

5 Q. Toluene?

6 A. Yes.

7 Q. There was not an objection to that
8 question?

9 MR. TENENBAUM: No. I am sorry.

10 Again, can I have a continuing
11 objection to your questions on hazardous
12 substances?

13 MR. FORT: I assumed that it was. I was
14 just surprised that you didn't say so it. So I
15 understand your position.

16 MR. TENENBAUM: Let me ask you --

17 MR. FORT: If I really wanted to get it by,
18 I really wouldn't have asked if you wanted to
19 object.

20 MR. TENENBAUM: Do you agree or disagree
21 with my objection?

22 MR. FORT: I think your objection stands for
23 the record.

24 Q. Mr. Boice, do you recall any other

1 substances in the Desoto waste that you would
2 view as a hazardous substance?

3 MR. TENENBAUM: Same objection.

4 A. Do I recall any?

5 BY MR. FORT:

6 Q. Yes.

7 A. Yes, I recall that there were other
8 ones, yes.

9 Q. Okay.

10 You don't recall specifically which
11 ones there were?

12 A. No.

13 Q. Do you recall what kinds of documents
14 might refresh your recollection as to these
15 substances?

16 MR. TENENBAUM: Same continuing objection.

17 A. The document I am talking about is the
18 response from Desoto, the 104 E response.

19 BY MR. FORT:

20 Q. Was it in the text of the response or
21 an attachment, or do you recall?

22 A. I think it was probably both.

23 Q. Was there just one 104 E response that
24 you are recalling?

1 MR. TENENBAUM: Same objection.

2 Do I have a continuing objection so I
3 don't have to interrupt?

4 MR. FORT: Yes.

5 MR. TENENBAUM: Thank you.

6 A. I don't remember.

7 BY MR. FORT:

8 Q. Okay.

9 To what extent can you describe or
10 identify for me how these hazardous substances
11 that you recall being in the Desoto waste
12 materials caused or contributed to the alleged
13 imminent substantial endangerment at the sites?

14 MR. TENENBAUM: Objection, instruct the
15 witness not to answer, as you are seeking
16 testimony on the finding of imminent substantial
17 endangerment.

18 MR. FORT: Counsel, I am not asking on the
19 finding or what led to the finding. I am asking
20 to what extent is Desoto liable or related to
21 the finding.

22 MR. TENENBAUM: I think you have already
23 asked questions about Desoto. And what the
24 other documents say, they say.

1 I don't see how your appending a little
2 attachment to your question which uses the words
3 imminent substantial endangerment entitles you
4 to ask about an imminent substantial
5 endangerment finding.

6 BY MR. FORT:

7 Q. Mr. Boice, are you not answering the
8 question based upon the instruction of your
9 counsel?

10 A. That's correct.

11 Q. Could you answer that question if your
12 counsel had not instructed you not to answer the
13 question?

14 A. To some degree, I could.

15 MR. TENENBAUM: I don't know whether there
16 is any way of rephrasing your question that
17 would go to a non-record issue.

18 But, as phrased, it seems to go to a
19 record issue.

20 MR. FORT: Counsel, I am not sure how. I
21 will come at it other ways.

22 But, I think that was a very fair,
23 legitimate, straightforward question that could
24 lead to a lot of other questions. So the

1 question stands.

2 Q. Mr. Boice, you said that you believed
3 toluene was in the Desoto waste materials and
4 that it was a hazardous substance.

5 What is your basis for viewing toluene
6 as a hazardous substance?

7 MR. TENENBAUM: Same objection. I am going
8 to -- well --

9 MR. FORT: Counsel, you have made your
10 objection, and an objection is fine. Let's let
11 the witness --

12 MR. TENENBAUM: Either your question seeks
13 one or two things, I am not taking a position as
14 to which at this time.

15 It either seeks a legal conclusion in
16 whole or in part, or it is seeking expert
17 testimony in whole or in part. And in either
18 case, I am entitled to instruct the witness not
19 to answer the question.

20 MR. FORT: You are not entitled to instruct
21 him not to answer, certainly not.

22 If there is a privilege, you can
23 instruct him not to answer. If it is relevant
24 as such, expert testimony and all of that, that

1 is, you may make an objection, but you cannot
2 instruct him not to answer.

3 MR. TENENBAUM: Legal conclusion.

4 MR. FORT: Nice objections, counsel. I
5 don't quarrel with your objections, but would I
6 like this witness to answer the question.

7 MR. TENENBAUM: I am not going to have the
8 testimony of a non-lawyer on legal issues.

9 MR. FORT: Counsel, may I have the
10 witness --

11 Excuse me. May I have the witness
12 answer?

13 MR. TENENBAUM: Will you allow me to
14 question your witnesses next week on the same
15 question? I would like to know.

16 MR. FORT: Counsel, I can ask any questions
17 I choose to ask. You can object to them.

18 MR. TENENBAUM: I think I made a valid
19 objection.

20 You have not told me whether or not you
21 disagree with my objection.

22 MR. FORT: Mr. Tenenbaum, it doesn't matter
23 if I agree or disagree with the objection. This
24 is discovery under the Federal Rules of Civil

1 Procedure.

2 You have made an objection, and the
3 witness may answer the question.

4 You already made your objection as to
5 whether or not he could opine or make a legal
6 conclusion on whether toluene is a hazardous
7 substance, I don't know if a chemical --

8 MR. TENENBAUM: I am afraid --

9 MR. FORT: Excuse me, counsel.

10 You have made your objection. I would
11 like to know the basis for him saying that
12 toluene is a hazardous substance. It is a very
13 simple question.

14 MR. TENENBAUM: Well, I am afraid that --

15 If you are willing to stipulate at this
16 time on the record that when I ask your
17 witnesses the same question, you will make the
18 same objection, you are going to allow your
19 witness to answer.

20 MR. FORT: I will let my witness answer, I
21 may make an objection, but I will certainly let
22 my witness answer.

23 MR. TENENBAUM: Okay.

24 Then you may subject to my objection,

1 if you know the answer.

2 A. You mean why it is legally called a
3 hazardous substances under CERCLA?

4 BY MR. FORT:

5 Q. Yes.

6 A. It is listed as a hazardous substance
7 under the regulations.

8 Q. In which regulations?

9 A. I don't know the number, but it is in
10 the regulation.

11 Q. In the Resource Conservation Recovery
12 Act regulations?

13 A. No, the CERCLA regulations.

14 Q. Okay.

15 Do you know why it is listed as a
16 hazardous substance under the CERCLA
17 regulations?

18 MR. TENENBAUM: Same continuing objection.

19 A. It is toxic.

20 BY MR. FORT:

21 Q. It is toxic?

22 A. And I think it is flammable. I think
23 it is just toxic. I am not sure at all.

24 Q. Okay.

1 It is toxic and it may be flammable?

2 A. I know it is flammable. What I meant
3 is it might be ignitable.

4 Q. Is it or is it not toxic, in your view?

5 A. I just said it was toxic. Can't you
6 hear?

7 Q. Well, you said it was toxic. Then you
8 said it may be flammable. Then you said it
9 might be ignitable. It is flammable, I know
10 that.

11 And your testimony is that toluene is a
12 hazardous substance because it is toxic, in
13 part; is that right?

14 MR. TENENBAUM: Same objection.

15 A. That is a fact.

16 BY MR. FORT:

17 Q. Okay.

18 And you believe it is also a hazardous
19 substance, because it is ignitable or flammable?

20 A. It is not --

21 I believe it is a fact that it is
22 toxic. It is listed as a hazardous substance in
23 the regulations for CERCLA.

24 I don't know, it might also be an

1 ignitable substance, which means that it can
2 burst into flames and under certain tests at
3 less than I think it is 60 degrees Fahrenheit.

4 Q. Okay.

5 A. Is that a good enough test?

6 MR. BLANTON: Would you like a cup of coffee
7 or a cup of decaf?

8 MR. TENENBAUM: Let's go off the record for
9 second.

10 (Discussion had off the record.)

11 MR. TENENBAUM: Let's take a break.

12 MR. FORT: We will take a short break.

13 (A short recess was taken.)

14 (The documents above-referred to
15 were marked Boice Deposition
16 Exhibit Nos. 43 and 44 for
17 identification.)

18 MR. BLANTON: Mr. Reporter, would you please
19 note my request that my remarks be stricken from
20 the record, and my apology to Mr. Boice, counsel
21 and the court for those inappropriate remarks.

22 BY MR. FORT:

23 Q. We are back on the record, having taken
24 a 15 minute break or so.

1 Mr. Boice, I would like to proceed.
2 Counsel, I understand that you have a continuing
3 objection to me asking this witness any
4 questions as to whether or not particular
5 materials are toxic or not.

6 And I take it if I want to ask him any
7 questions about xylene or other particular
8 substances, you would object to that as a legal
9 conclusion as well as calling for an expert
10 opinion?

11 MR. TENENBAUM: Yes, that's correct.

12 MR. FORT: Okay. With that understanding.

13 MR. TENENBAUM: One or the other or both.

14 MR. FORT: Okay.

15 I take it that would apply if I asked
16 questions as to acetone, methyl ethyl ketone,
17 otherwise known as 2-butanone, b-u-t-a-n-o-n-e,
18 methyl isobutyl ketone, ethyl acetate or xylene?

19 MR. TENENBAUM: Yes.

20 MR. FORT: As well as any other specific
21 chemical substances that might or might not be
22 hazardous substances?

23 MR. TENENBAUM: Yes.

24 MR. FORT: With that, I will push on.

1 Q. Mr. Boice, again in the context of
2 potential liability of my client, and
3 specifically as to that, although it may have
4 other implications in this case.

5 Can you tell me whether or not there is
6 any information that you are aware of that is
7 not in the administrative record as certified,
8 including as amended yesterday, that would
9 describe whether or not particular materials or
10 chemicals or substances cause or contributed to
11 an imminent and substantial endangerment?

12 MR. TENENBAUM: I will assume that you are
13 speaking of the EPA's finding of imminent and
14 substantial endangerment, which would be a
15 record-review issue in our view.

16 Therefore, we are going to have to
17 object and instruct the witness not to answer on
18 the ground that you are seeking discovery into a
19 record-review issue.

20 And also you are calling for a legal
21 conclusion. I might add that ground as an
22 additional basis for an objection.

23
24 BY MR. FORT:

1 Q. Mr. Boice, are you not answering based
2 upon your counsel's instruction?

3 A. Yes.

4 Q. Could you answer that question if he
5 had not made that instruction?

6 A. Yes.

7 Q. Mr. Boice, are you aware of any
8 information, other than what is included in the
9 record, that would go to whether or not
10 particular chemical substances sent by my client
11 Desoto to the site were associated with the
12 conditions at the site as they presently exist
13 such as to be associated with the Agency's
14 determination that an imminent and substantial
15 endangerment exists?

16 MR. TENENBAUM: Objection, calls for a legal
17 conclusion in part. It is vague and ambiguous.

18 And calls for, at least in part, if not
19 in full, for discovery into record-review
20 issues.

21 If your question is whether the
22 witness --

23 MR. FORT: Counsel, it was whether or not
24 they are any documents that are not in the

1 record that relate to that category.

2 MR. TENENBAUM: Well, whether there are any
3 documents in the record that relate to that
4 category is the same objection.

5 There may be a way to rephrase it to
6 make it a non-objectionable question.

7 MR. FORT: Are you going to let the witness
8 answer?

9 MR. TENENBAUM: Not as phrased. No.

10 MR. FORT: Are you directing him not to
11 answer?

12 MR. TENENBAUM: Yes.

13 BY MR. FORT:

14 Q. Mr. Boice, are you not answering based
15 upon your counsel's instruction?

16 A. Yes.

17 Q. If he had not given that instruction,
18 could you answer the question?

19 A. Would you repeat the question.

20 MR. FORT: Would you read it back, please.

21 (The record was read.)

22 A. I don't understand the question.

23 Q. Mr. Boice, with respect to this
24 determination of imminent substantial

1 endangerment, did EPA collect any data after the
2 signing of the record of decision or after --
3 strike that -- or after the completion of the
4 reading of the investigation of the feasibility
5 study for the purpose of making the
6 determination, or which was used in making the
7 determination in late 1989 that there was an
8 imminent substantial endangerment at the site?

9 MR. TENENBAUM: Objection. Instruct the
10 witness not to answer, seeking discovery on a
11 record issue.

12 BY MR. FORT:

13 Q. Mr. Boice, could you answer that
14 question if counsel had not directed you not to
15 answer it?

16 A. Yes.

17 Q. And you are not answering based upon
18 his instructions, correct?

19 A. Correct.

20 Q. Is the documentation as to the risks to
21 human health and the environment presented in
22 the record of decision complete to the best of
23 your knowledge?

24 MR. TENENBAUM: Risks. I am sorry. Could

1 you read that back, please?

2 MR. FORT: Can you read it back, please.

3 (The question was read.)

4 MR. TENENBAUM: Same objection and
5 instruction.

6 BY MR. FORT:

7 Q. Mr. Boice, could you answer that if
8 your counsel had not instructed you not to
9 answer it?

10 A. I don't understand the question.

11 Q. Do you believe that the documentation
12 included in the record of decision is complete?

13 A. What does complete mean?

14 Q. That all the data that was collected by
15 EPA concerning environmental conditions at the
16 site is presented in the record of decision or
17 referenced by the record of decision?

18 MR. TENENBAUM: That is a different question
19 you have now asked.

20 MR. FORT: He said he didn't understand it,
21 so I rephrased it.

22 MR. TENENBAUM: These questions are tied
23 into a finding of imminent substantial
24 endangerment, right?

1 Is that what you are still talking
2 about?

3 MR. FORT: We are talking about endangerment
4 issues still here, counsel. I haven't changed
5 the thrust of this.

6 You kept objecting. I am trying to go
7 at it different ways to try to elicit a
8 response.

9 MR. TENENBAUM: Well --

10 MR. FORT: There is a question pending.

11 MR. TENENBAUM: Well, I will have to decide.

12 Your question pending is just the
13 limited question as to whether or not there is
14 information pertaining to conditions at the site
15 that is not in the record.

16 Is that the limited question that you
17 are asking?

18 MR. FORT: I have been asking that question
19 in different ways several times now.

20 MR. TENENBAUM: Until just now you have
21 always tied it into the Agency finding of
22 imminent substantial endangerment.

23 There are documents that have been
24 produced pertaining to conditions at the site

1 that may or may not have been considered in
2 connection with the finding of imminent
3 substantial endangerment. I don't know.

4 MR. FORT: Could you find the question and
5 read it back?

6 (The record was read as follows:

7 "Q. Do you believe that
8 the documentation included
9 in the record of decision is
10 complete?

11 A. What does complete
12 mean?

13 Q. That all the data
14 that was collected by EPA
15 concerning environmental
16 conditions at the site is
17 presented in the record of
18 decision or referenced by
19 the record of decision?"

20 MR. TENENBAUM: I am going to have to object
21 to the extent you are asking about compilation
22 of the record and instruct the witness not to
23 answer.

24 If you want to confine your question to

1 conditions at the site.

2 BY MR. FORT:

3 Q. Mr. Boice, can you answer that question
4 as modified?

5 A. Yes.

6 Q. Are you not answering that question
7 based upon your counsel's instruction?

8 A. Yes.

9 Q. I have asked the court reporter to mark
10 two documents as exhibits the pages marked as
11 page 9 out of the two records of decision.

12 We had some documents marked yesterday
13 with the day's date and numbered 1 through 13.
14 We are going to reserve some numbers here, but
15 try to get back into a continuous numbering
16 system for this witness. I think that will be
17 much clearer.

18 Counsel, do you have any objection to
19 that?

20 MR. TENENBAUM: You say you are going to
21 renumber the ones from yesterday?

22 MR. FORT: We will have two numbers on it,
23 but we can do that at a break.

24 MR. TENENBAUM: I have no objection to that.

1 MR. FORT: Okay.

2 With that, I have asked the court
3 reporter to mark as exhibit Boice Exhibit No. 43
4 page 9 from the Midco I R.O.D. and Exhibit 44 is
5 page 9 from the Midco II record of decision.

6 Q. Mr. Boice, I am not going to ask you as
7 to whether or not you prepared this or how it
8 was prepared or anything like that.

9 But, directing your attention to the
10 bottom part of the page, where the statement is
11 made, "The main compounds causing the
12 carcinogenic risks are:" Then you have a
13 category, "ground water, soils and surface
14 water."

15 And then you have a category of
16 noncarcinogenic risks in ground water. And I
17 believe that same format is used, that's the
18 format for Midco I.

19 And Midco II you have an additional
20 category of -- I am sorry, we will just stop at
21 that, of soils, I am sorry, soils for Midco II
22 as well.

23 Mr. Boice, I would like you to take a
24 moment to look at those and then tell me whether

1 or not you recognize any of those substances
2 there as being materials that you believe are
3 the same materials that were sent by Desoto?

4 A. I would have to review the files, but I
5 heard you mention methylene chloride.

6 Q. I mentioned methylene chloride?

7 A. Yes.

8 Q. I am not sure that I did.

9 But, if you recall, I want you to
10 answer what things you recall as being
11 substances sent by Desoto that are on that list
12 there.

13 MR. TENENBAUM: Let me reiterate at this
14 time my objection to the earlier line of
15 questioning about the substances that Desoto
16 sent to the site.

17 You have not permitted the witness to
18 review all the files that are available on that,
19 and you are seeking his testimony on documents
20 and other matters that are either in the case or
21 produced by third parties, which is not proper
22 in this instance.

23 Furthermore, we have gone into an area
24 in which you also are seeking, at least in part,

1 expert witness testimony. And this witness has
2 not been designated as an expert witness.

3 MR. FORT: Mr. Tenenbaum, this witness was
4 produced by the government as being the person
5 who can testify as to various items.

6 I am asking him very limited a
7 question --

8 MR. TENENBAUM: You are --

9 MR. FORT: Excuse me. Excuse me.

10 I am asking him very limited questions
11 as to whether or not as to reports that were
12 done, either prepared by him, I believe that was
13 the testimony yesterday as to the R.O.D., or
14 were done under his supervision as remedial
15 project manager, and whether or not he can
16 recall or identify any substances that I have
17 just called his attention to as being substances
18 sent by Desoto.

19 MR. TENENBAUM: That does highlight the
20 whole point of my objection. That is, this
21 witness is not being designated to testify on
22 the hazardous nature of Desoto's substances.

23 Now, you had a multiply compound
24 designation in your request, which covered a lot

1 of issues. It did -- it might have had the word
2 hazardous substances in there, but it covers a
3 lot of other liability issues.

4 It was on those other liability issues
5 that this witness was designated.

6 If you had requested a witness to
7 testify on the hazardous nature of Desoto's
8 waste, we would have not produced this witness
9 on that.

10 MR. FORT: Counsel, I wish you would listen
11 to the question.

12 I just asked him for substances, these
13 are chemicals. I am not asking whether or not
14 they are hazardous or not. These are simply
15 chemicals.

16 MR. TENENBAUM: Even as to the chemicals
17 that were constituents of Desoto's waste, that
18 requires expert testimony. It may require
19 expert testimony in part.

20 MR. FORT: I thought there was witness
21 was --

22 MR. TENENBAUM: We would not designate the
23 witness for that purpose.

24 MR. FORT: I asked for category number 1 all

1 facts or information relating to whether Desoto
2 arranged for treatment or disposal of hazardous
3 substances at either or both the Midco sites.
4 Then about imminent substantial endangerment.

5 Let's ask what the witness' knowledge
6 is.

7 MR. TENENBAUM: Just a second.

8 Let me just make clear that our
9 understanding was that you were -- you wanted a
10 witness that could tie you to Midco I and Midco
11 II. That was the general thrust of your
12 designation number 1.

13 If you wanted to focus in on the
14 substance issues, what were the substances in
15 Desoto's waste, we would have -- we probably did
16 object on these grounds already, but we would
17 have objected on the grounds that I have set
18 forth today.

19 MR. FORT: You are objecting to any inquiry
20 as to whether substances we sent were hazardous?

21 MR. TENENBAUM: We told you that either asks
22 for a legal conclusion or it seeks expert
23 witness testimony.

24 To the extent you are seeking testimony

9
1 of an expert witness, I should also add up until
2 now you, as well as virtually every other
3 defendant, has led us to believe that we would
4 be able to enter into a stipulation, taking the
5 hazardous substance issue out of the case.

6 It wasn't until just yesterday that you
7 indicated -- or we may still be able to do that,
8 but there may be a problem with that.

9 So, we certainly have not been focusing
10 on that for preparation of this deposition.

11 MR. FORT: Counsel, I object to you putting
12 into the record any discussions that we may have
13 had off the record.

14 I am asking this witness a very simple
15 question. Can he recall whether or not any of
16 the substances, any of the chemicals listed in
17 that part, in those documents, are substances,
18 the same substances that were allegedly sent to
19 either of the sites by Desoto.

20 MR. TENENBAUM: Same objection as before.

21 And if you know the answer, you can
22 answer to the best of your ability.

23 A. Okay.

24 First of all, as I stated before,

1 benzene, I mentioned benzene and toluene, those
2 were just off the top of my head out of the list
3 of chemicals that were in your 104 E response.

4 So really to give a meaningful answer,
5 I would have to review that response. Although
6 I do see benzene and xylene, I think -- no,
7 toluene and xylene, I mean, in the list of
8 hazardous substances exceeding maximum
9 contaminant levels in the ground water.

10 Q. Okay.

11 A. But, to really give a meaningful answer
12 I would have to review your response, plus even
13 the 104 E response isn't necessarily the
14 universe of information we will be able to come
15 up with on chemicals you have disposed of at the
16 site.

17 Q. Okay.

18 So to answer my question, you would
19 need to refresh your recollection by looking at,
20 number one, the Desoto 104 E response, correct?

21 A. Yes.

22 Q. At least that?

23 A. Yes.

24 Q. And what other types of information

1 would you want to look at to refresh your
2 recollection or to rely upon to answer that
3 question?

4 MR. TENENBAUM: Same continuing objection.

5 A. That's the only document I know of that
6 identifies hazardous substances from Desoto,
7 except I think we have a permit application,
8 too, that identifies various hazardous
9 substances.

10 Q. What type of permit application are you
11 referring to?

12 A. I don't know. I haven't seen it.

13 Q. Okay.

14 Somebody has told you about it?

15 A. Yes.

16 Q. Who was it that told you about it.

17 MR. TENENBAUM: Objection.

18 Instruct the witness not to answer
19 anything to do with attorney-client
20 communication.

21 BY MR. FORT:

22 Q. Mr. Boice, you are not going to answer
23 that question based upon what Mr. Tenenbaum just
24 told you?

1 A. What question?

2 MR. TENENBAUM: If you want to indicate
3 whether you have discussed the matter with
4 attorneys, as long as you agree that that in
5 itself doesn't constitute any waiver. You can
6 indicate that, that's the substance of the
7 communications.

8 MR. FORT: Who told you? Was it a lawyer
9 who told you about that?

10 You have got to establish that it was
11 at least a lawyer that he talked to. Then we
12 can go from there whether or not there is
13 attorney-client. But, if he talked to somebody
14 on the street who told him that, then that is
15 not privileged.

16 MR. TENENBAUM: You can indicate that but do
17 not testify as to the substance of any
18 communications with an attorney.

19 A. It was based on discussions I have had
20 with counsel.

21 BY MR. FORT:

22 Q. Either Mr. Tenenbaum or Mr. Berman?

23 A. Yes.

24 Q. Mr. Boice, if you would look again at

1 what we have marked as Exhibits 43 and 44.

2 There is a reference there with an asterisk, do
3 you see that, under lifetime cumulative
4 carcinogenic risk.

5 Do you see that column?

6 A. Yes, I do.

7 Q. Okay.

8 And there's a reference there to a
9 document, table 4-22 of the addendum to the
10 public comment feasibility study, Midco I?

11 A. Yes.

12 Q. Okay.

13 So the values presented on Exhibit 43
14 for Midco I were taken from the addendum to the
15 public comment feasibility study for Midco I,
16 correct?

17 MR. TENENBAUM: Objection. I think you are
18 taking discovery on the record issue, aren't
19 you?

20 MR. FORT: I am trying to understand, it is
21 not clear to me that that is what it is. If it
22 isn't, I want to know that. If it is, that is
23 fine. It is a simple question.

24 MR. TENENBAUM: You have taken part of the

1 Agency's record of decision and you are asking
2 for him to interpret or explain it.

3 I don't think you are entitled to take
4 discovery and seek explanation in a deposition
5 of the basis for the Agency's decision, or part
6 of the reasoning in support of that decision.

7 That's the issue before the court, is
8 it not.

9 MR. FORT: Is that an objection or
10 instruction not to answer or are we just
11 debating?

12 MR. TENENBAUM: I am trying to make sure I
13 understand your question.

14 Unless you can educate me as to how I
15 misunderstand your question, then that would be
16 an objection and instruction, yes.

17 BY MR. FORT:

18 Q. Mr. Boice, are you not answering based
19 upon your counsel's instruction?

20 A. Yes.

21 Q. Could you answer that question if
22 counsel had not told you not to answer it?

23 A. Yes.

24 Q. My problem is, this number doesn't

1 appear in the document that is referenced.
2 Something happened between the reference in here
3 and I want to understand what was done. And
4 that is nowhere in the record.

5 It may be a simple mathematical
6 calculation. If that is what it is, that is
7 fine. But, I am trying to understand what this
8 document means.

9 So, Mr. Boice, can you tell us how the
10 chart here, "lifetime cumulative carcinogenic
11 risk," was developed based upon the table 4-22
12 of the addendum to the public comment
13 feasibility study?

14 MR. TENENBAUM: Well --

15 MR. FORT: Are you going to object or not?

16 MR. TENENBAUM: Yes. I am going to object
17 and instruct the witness not to answer.

18 I don't believe you laid a sufficient
19 predicate for that type of discovery.

20 MR. FORT: Are you directing him not to
21 answer, or are you letting him answer?

22 MR. TENENBAUM: No. I am directing him not
23 to answer.
24

1 BY MR. FORT:

2 Q. Mr. Boice, could you answer that
3 question if counsel had not told you not to
4 answer that question?

5 A. Yes.

6 Q. And you are not answering because he
7 told you not to answer it?

8 A. Correct.

9 Q. Would the same situation be true, Mr.
10 Boice, assuming that counsel would object to the
11 Midco II document, Exhibit 43?

12 A. Yes.

13 Q. Mr. Boice, yesterday you indicated that
14 you had information as to what company or
15 companies were responsible for the
16 polychlorinated biphenyls at the site.

17 Do you recall that testimony?

18 A. Could you repeat the question?

19 MR. FORT: Read it back.

20 (The record was read.)

21 A. I said just the opposite.

22 Q. You don't recall who it is?

23 A. We don't know who it is.

24 Q. You do not know who it is?

1 A. No.

2 Q. Okay. I am sorry, I didn't hear the
3 testimony correctly.

4 There is no documentation in the 104 E
5 responses, in the other third-party discovery
6 you have obtained, or anything of that nature
7 that would indicate who the source of the PCBs
8 is?

9 A. Not that I know of.

10 Q. So, you don't know if any of the
11 defendants in this case sent PCBs to the site?

12 MR. TENENBAUM: You want to know without his
13 viewing any further documents, is that correct?

14 MR. FORT: That's right. Based upon his
15 knowledge right now.

16 A. Not that I know of.

17 Q. Do you have any recollection that
18 Desoto sent PCBs to the site?

19 MR. TENENBAUM: Without reviewing documents?

20 MR. FORT: Yes.

21 A. No.

22 BY MR. FORT:

23 Q. If you were going to review documents
24 in order to understand that, what documents

1 would you look at?

2 Would those be the same documents we
3 have already talked about?

4 A. Yes.

5 Q. All right.

6 A. Anything else we can get.

7 Q. Maybe we can work together on that one.

8 Mr. Boice, do you consider yourself an
9 expert on the issue of what materials are
10 hazardous substances or not?

11 MR. TENENBAUM: Same objection as earlier.

12 MR. FORT: This is whether he considers
13 himself an expert. Not whether he is your
14 designated expert. The man's training is as a
15 chemical engineer.

16 MR. TENENBAUM: The same objection as
17 before.

18 A. You mean in the law regarding what is
19 hazardous?

20 BY MR. FORT:

21 Q. Let me rephrase the question.

22 In your day-to-day work as a remedial
23 project manager, are you routinely expected to
24 make a determination of whether or not a

1 substance is a hazardous substance or not?

2 MR. TENENBAUM: Same objection.

3 A. You mean under the regulation?

4 BY MR. FORT:

5 Q. As you are doing your job, whether it
6 is under the regs or whatever it is that you
7 abide by.

8 A. Well, we make determinations whether it
9 is hazardous under the regulations.

10 Q. Okay.

11 A. If it is something more sophisticated
12 than that, I am not an expert in toxicology or
13 industrial accidents or things like that.

14 Q. Okay.

15 One of the appendices to the remedial
16 investigation for the site, Appendix F, deals
17 with making risk assessment determinations.

18 Are you generally familiar with that
19 document?

20 A. Yes.

21 Q. Okay.

22 With respect to your earlier testimony
23 about toluene, would you believe that this would
24 be a more thorough explanation of the potential

1 hazardous nature of toluene or would you believe
2 that your view is the better view?

3 MR. TENENBAUM: I am going to object to
4 that. That is not a proper question.

5 Also it is seeking discovery into
6 the -- what was that appendix?

7 MR. FORT: It is Appendix F to the remedial
8 investigation for Midco I is what I am looking
9 at.

10 MR. TENENBAUM: Who is the author of
11 Appendix F?

12 MR. FORT: I don't know.

13 It is entitled, "EPA modification to
14 IARCA approach," is Appendix F-A. That is the
15 one I am looking at. I am sorry, I am looking
16 at Appendix F-C, which is, "Environmental fate
17 and transport of the indicator chemicals for
18 Midco I, Lake County, Indiana."

19 I am sorry, I misspoke.

20 MR. TENENBAUM: Well, is that marked as an
21 exhibit?

22 MR. FORT: Let me just show you, it is part
23 of the record, I will stipulate to that.

24 Q. And I just direct your attention, Mr.

1 Boice, to page C-5 of Appendix F, which deals
2 with in paragraph C.7 which is entitled,
3 "toluene."

4 I ask you to just take a moment to read
5 through those two paragraphs or so.

6 MR. TENENBAUM: Can we have those pages, two
7 pages marked as an exhibit?

8 MR. FORT: I don't think there is a need to.
9 If you want them marked, that is fine with me.
10 I didn't prepare it. I don't know who authored
11 it. If you want it.

12 MR. TENENBAUM: If we are going to have him
13 answer any questions on it, then it should be an
14 exhibit.

15 MR. FORT: I think it is pretty well
16 identified. If you want to take a while and
17 make copies, we can reserve a number.

18 I don't think you want to take that
19 whole thing.

20 MR. TENENBAUM: No. I would be just happy
21 with the cover page and the two pages.

22 MR. FORT: Okay. Let's reserve Exhibit 45
23 for that.
24

1 (The document above-referred to
2 was marked Boice Deposition
3 Exhibit No. 45 for identification.)

4 Q. Mr. Boice, have you had a chance to
5 look at those paragraphs?

6 A. Yes.

7 Q. Do you disagree with the statements
8 that are made in there as to the characteristics
9 of toluene?

10 MR. TENENBAUM: Objection, no foundation and
11 it seeks expert testimony and/or legal
12 conclusions.

13 If you understand the question, you can
14 answer it if you know the answer.

15 A. As far as I can -- it appears as though
16 it is probably accurate. But, I'm not a
17 toxicologist, so I can't comment on the detail.

18 BY MR. FORT:

19 Q. Okay.

20 Earlier you said that toluene was
21 toxic. Does that excerpt say that toluene is
22 toxic or does it just say that it is flammable
23 or ignitable?

24 MR. TENENBAUM: The document speaks for

1 itself. He didn't write the document, did he?
2 I don't see -- I will object to that question.
3 No foundation.

4 A. Well, I don't put any special
5 significance on what it says there. But, it
6 doesn't particularly, specifically say it is
7 toxic. That is true.

8 BY MR. FORT:

9 Q. Thank you.

10 Mr. Boice, are you aware of any
11 information that would indicate that my client
12 Desoto is not in compliance with the unilateral
13 administrative orders issued by EPA in late
14 1989?

15 A. Yes.

16 Q. And what is that information?

17 A. The same as for the other parties I
18 have already answered that question for. That
19 there were letters sent to the Agency, one was
20 dated December 29. There were letters,
21 follow-up letters in January, and I think one in
22 February. And those letters indicated that they
23 were not willing to comply with the order.

24 Q. Let's mark these as 46 and 47 then.

1 (The documents above-referred to
2 were marked Boice Deposition
3 Exhibit Nos. 46 and 47, respectively,
4 for identification.)

5 A. Where is the feasibility study thing?
6 That is not part of the record yet. You want
7 that in the record?

8 MR. TENENBAUM: Off the record.

9 (Discussion had off the record.)

10 MR. FORT: Back on the record.

11 O. Mr. Boice, we have marked two letters
12 as Exhibits 46 and 47. One being a December 29,
13 1989 letter on Sidley & Austin stationery
14 addressed to Mr. Michael Berman, and another one
15 dated January 19, 1990 also addressed to Mr.
16 Michael Berman again on Sidley & Austin
17 stationery. And both of those letters are
18 responses to the unilateral orders.

19 Have you seen these documents before?

20 A. Yes.

21 Q. And you reviewed these documents
22 before?

23 A. Yes.

24 Q. Okay.

1 Could you tell me where in Exhibit 46,
2 which is the December 29 letter, the respondents
3 there say they will not comply with the
4 unilateral administrative order?

5 A. Well, that is difficult to answer
6 because it was written in a very confusing
7 manner. But --

8 MR. TENENBAUM: I would like the witness to
9 read the whole letter.

10 A. Okay.

11 BY MR. FORT:

12 Q. Mr. Boice, you have had a chance to
13 review both Exhibits 46 and 47 now?

14 A. No, just 46.

15 Q. Okay. Just 46. Okay.

16 What in Exhibit 46 do you believe
17 constitutes non-compliance with the unilateral
18 administrative orders?

19 A. Okay.

20 First of all, they say they will
21 construct and implement.

22 MR. TENENBAUM: Before you answer, let me
23 state just for the record, to the extent that
24 the question is seeking a legal conclusion, I do

1 register my objection to it. To the extent that
2 it does not, it is factual, I will not object to
3 it.

4 MR. FORT: Counsel, you have made an
5 allegation in your complaint that we are not in
6 compliance.

7 If this is not the witness, we need to
8 know who the witness is that will assert that.
9 I appreciate your caveat, but let's let the
10 witness answer.

11 A. What the respondent or respondents
12 agreed to do was to install a RCRA compliance
13 cap over the site and install a ground water
14 extraction and treatment system.

15 And then they said they would discharge
16 the collected ground water to a discharge system
17 alternative selected pursuant to respondents'
18 design work.

19 And the unilateral order and the record
20 specifically stated that the discharge would
21 either be to a deep well or to a shallow well,
22 in such a manner that the plume would not -- the
23 salt plume would not migrate.

24 And that, second, it says the:

1 "Installation of
2 the soil solidification/soil
3 vapor extraction system
4 described in Section V,
5 Paragraph D of the orders --
6 "would be implemented "-- if
7 it is determined by the
8 parties or the court
9 decides, upon completion of
10 the treatability study still
11 to be performed, that,
12 following remediation of
13 presently contaminated
14 ground water, soil
15 solidification would be
16 effective and sufficient,
17 and consistent with the
18 National Contingency Plan,
19 to prevent the ground water
20 from exceeding ground water
21 clean up action levels
22 defined in the Midco
23 feasibility studies."
24 And those criteria are inconsistent

1 with the record of decision.

2 The record of decision says that the
3 unilateral order that soil solidification/vapor
4 extraction system be conducted on the soil. And
5 that was -- to comply with the order, you have
6 to implement what was provided for in the order.

7 Q. Let's take those two items that you
8 have identified, that this letter said that
9 there will be a discharge to a point pursuant to
10 the design work.

11 Is there anything in this commitment to
12 do the design work that precludes either a deep
13 well or a shallow well disposal of the extracted
14 and treated ground water?

15 MR. TENENBAUM: Same objection.

16 A. No. But --

17 BY MR. FORT:

18 Q. Okay.

19 No, okay.

20 MR. TENENBAUM: Let him finish.

21 A. No, but --

22 MR. TENENBAUM: He is in the middle of a
23 sentence and you are interrupting him.

24 A. The R.O.D. provided for those options

1 for the disposal of ground water. To comply
2 with the ground water, you have to agree to
3 implement the -- proceed in accordance with the
4 procedures provided in the order.

5 BY MR. FORT:

6 Q. In your view as to the ground water
7 discharge issue, the non-compliance is because
8 the respondents here said they wanted to
9 investigate other options beyond those
10 specifically mentioned in the record of decision
11 or specifically mentioned in the unilateral
12 order, correct?

13 A. That's not what the letter said. It
14 says you are going to select it pursuant to the
15 design work.

16 Q. But what is going to be covered by the
17 design work?

18 A. EPA already selected the remedy in the
19 record of decision dated June 30, 1989.

20 The unilateral order provided for
21 implementing this remedy selected by USEPA,
22 which was in accordance with all the Agency
23 procedures, including public comment period,
24 reviewing public comments, including comments

1 from the respondents.

2 And so we went through all those
3 procedures already. We determined the proper
4 procedures for discharging the ground water and
5 then we issued an order, ordering you to
6 implement the remedy in accordance with the
7 procedures selected by the Agency.

8 Q. What is the remedy under the record of
9 decision for handling the extracted ground
10 water?

11 A. That's in the record of decision.

12 Q. Is it one or two items?

13 A. Is what one or two items?

14 Q. Is it going to the deep well,
15 necessarily?

16 Is it going to the deep well,
17 necessarily?

18 MR. TENENBAUM: The record of decision --

19 MR. FORT: Let him answer the question
20 please, counsel.

21 Q. Is it going to the deep well,
22 necessarily?

23 A. There were two options. It can either
24 be deep welled or it could be --

1 Q. So after the Agency had the feasibility
2 study in hand, after going through the public
3 comment period. When it gets down to the record
4 of decision, it ended up still with at least two
5 options, correct, either a deep well.

6 And within that wasn't there two
7 issues, whether or not the hazardous
8 constituents were treated or not treated before
9 discharge, and also the shallow well, within a
10 slurry wall, correct?

11 MR. TENENBAUM: Objection.

12 A. That's correct.

13 Q. Okay.

14 So even after the record of decision,
15 there was more work which needed to be done
16 before the point of discharge was determined,
17 correct?

18 MR. TENENBAUM: Same objection.

19 A. Yes. But this provides for --

20 BY MR. FORT:

21 Q. Let me --

22 A. -- pursuant to the respondents' design
23 work.

24 Q. Sir, wait a minute, answer the

1 question, don't argue with me. Answer the
2 question.

3 A. The unilateral order provided for EPA
4 to select the procedure for disposing of the
5 ground water. Not the respondents.

6 Q. Okay.

7 Let's go back. Now you have introduced
8 another problem, which is that EPA was to select
9 not the respondents.

10 After going through the studies that
11 were done, there was still design work needed
12 before a decision could be made even by the
13 Agency as to whether or not to put the treated
14 ground water in a deep well or into a shallow
15 well, correct?

16 A. That's correct.

17 Q. Okay.

18 Now, the other problem that you
19 identified or non-compliance is that
20 solidification would be performed only after the
21 treatability study is done, and if either the
22 parties agreed or the court made a decision.

23 Is that the other problem that you
24 have, the non-compliance with the orders?

1 A. Yes.

2 Q. Okay.

3 Now, does EPA know for sure that
4 solidification will be done --

5 A. No.

6 Q. -- regardless?

7 A. No. No.

8 But, EPA is going to determine whether
9 or not it should be implemented based on the
10 treatability study.

11 Q. The treatability study has to be done
12 before a final decision is made on that; is that
13 correct?

14 A. That's correct.

15 Q. Okay.

16 And under Agency guidance, treatability
17 studies are supposed to be done as part of the
18 feasibility study, aren't they?

19 MR. TENENBAUM: Objection.

20 A. Not necessarily.

21 BY MR. FORT:

22 Q. Is that what the National Contingency
23 Plan says?

24 MR. TENENBAUM: Objection.

1 A. What?

2 BY MR. FORT:

3 Q. That treatability studies are supposed
4 to be done as part of a feasibility study?

5 A. It advises that it be.

6 MR. TENENBAUM: Hold it. Same objection.

7 A. That treatability studies be conducted
8 as soon as possible in the feasibility process.

9 BY MR. FORT:

10 Q. And treatability studies are supposed
11 to be done before there is even a record of
12 decision entered; is that right?

13 A. That is not true.

14 Q. That's not true?

15 A. They don't have to be done.

16 Q. What authority do you have for that
17 statement, is that your opinion?

18 MR. TENENBAUM: Objection, calls for a legal
19 conclusion.

20 MR. FORT: He has already given his legal
21 conclusion.

22 MR. TENENBAUM: I have objected to all of
23 those questions.

24 MR. FORT: Okay. Fine.

1 Q. Your answer?

2 A. The National Contingency Plan.

3 Q. It is in the National Contingency Plan?

4 A. Yes.

5 Q. Okay.

6 We have talked about the respondents
7 here investigating things in addition to the
8 deep well or shallow well option for the ground
9 water, and we have talked about --

10 A. No, we didn't talk about that.

11 We talked about it says right here
12 either the court or the respondents somehow, I
13 think. See what it says. It means the parties,
14 and that includes you, it says the court will
15 make the decision.

16 We aren't talking about just doing an
17 evaluation.

18 Q. Where does it say anything about the
19 court with respect to ground water?

20 A. I thought you were talking about
21 solidification.

22 Q. No. I am just talking about ground
23 water, hadn't gotten to solidification yet. You
24 are reading my mind.

1 A. Okay. Okay.

2 Regarding ground water, it is saying it
3 is going to be selected pursuant to the
4 respondents' design work.

5 Q. Okay.

6 Does it say who is going to select it?

7 A. No, but it implies the respondents
8 will.

9 Q. But the words "respondents make a
10 decision" is not there?

11 A. We sent you a follow-up letter asking
12 you to clarify it.

13 Q. Okay.

14 A. Obviously, as I stated before, this
15 letter is very ambiguous. It is hard to figure
16 out what you are committing to do.

17 Q. Okay.

18 Well, it is fairly clear in paragraph
19 1, isn't it, that we are going to complete the
20 remedial action and remedial design work plans?

21 MR. TENENBAUM: Objection.

22 BY MR. FORT:

23 Q. That was stated on page 1, paragraph 1

24 A.

1 A. That is what it says.

2 But, based on the entire letter, it is
3 very ambiguous as to what you are going to do.
4 I don't think the Agency can determine what you
5 were really committing to do based on this
6 letter.

7 Q. You say that the Agency doesn't know
8 what we are going to do when we say we intend to
9 comply with the terms of the orders by
10 completing the remedial action, remedial design
11 work plans. That's ambiguous?

12 MR. TENENBAUM: Objection.

13 Mischaracterizes the testimony when you
14 selectively quoted.

15 MR. FORT: I am reading from the letter,
16 counsel. I am asking him for his testimony.

17 MR. TENENBAUM: You are reading from only a
18 portion of the letter. He has already testified
19 about the whole letter.

20 Go ahead. If you understand the
21 question, you can answer.

22 BY MR. FORT:

23 Q. Okay.

24 You still believe that paragraph 1 A is

1 ambiguous?

2 A. Well, paragraph 1 A is not ambiguous.
3 But, if you read the whole letter, the second
4 page is inconsistent with that statement.

5 You are not committing to implement the
6 remedial action, remedial design work plan as
7 provided for in the unilateral administrative
8 order from EPA.

9 Q. What did we say we were going to do
10 that was inconsistent with remedial action and
11 with completing the remedial action remedial
12 design work plans?

13 A. Didn't I just say that?

14 We have been spending the last 15
15 minutes talking about that.

16 Q. Counsel, let's just go ahead.

17 Now, you think this letter was
18 ambiguous. Directing your attention to Exhibit
19 number 47.

20 MR. TENENBAUM: He hasn't reviewed that one
21 yet.

22 BY MR. FORT:

23 Q. I would like you to take a minute then
24 to review it. It is a short letter.

1 Mr. Boice, have you had a chance to
2 look at Exhibit 47?

3 A. Yes.

4 Q. Are you making a few notes there on the
5 document itself?

6 A. No, I am just marking it.

7 Q. Let the record reflect the witness has
8 just made a couple of notations in the lefthand
9 margin.

10 A. Not a notation. I made marks on the
11 document.

12 Q. I stand corrected.

13 Mr. Boice, what in this document
14 indicates that the companies on whose behalf it
15 was submitted, which is Pre Finish Metals,
16 Insilco and Desoto, are not in compliance -- as
17 of the date of this letter, were not in
18 compliance with the unilateral administrative
19 orders?

20 MR. TENENBAUM: I objected to that before.

21 A. I am not an attorney, but it indicates
22 that they were not willing to -- that if they
23 complied, they were also going to litigate the
24 remedy.

1 BY MR. FORT:

2 Q. That was no, that's non-compliance with
3 the order?

4 MR. TENENBAUM: Same objection.

5 A. Yes.

6 Because under Section 106, the
7 respondent can't litigate the remedy and obey
8 the order at the same time. They obey the order
9 and then they can litigate after completion of
10 the remedial action.

11 BY MR. FORT:

12 Q. Is that your view of the law?

13 MR. TENENBAUM: Same objection.

14 A. Yes. That's advice from counsel.

15 Q. Is there any technical information --

16 MR. TENENBAUM: Confine your answers.

17 BY MR. FORT:

18 Q. I am going to ask him, Mr. Tenenbaum,
19 you can make notes, and you can rehabilitate
20 him. Don't educate him here. I am going to ask
21 this question.

22 Is there any technical information
23 other than what your counsel has told you about
24 the law, that would say that we have not

1 complied with the unilateral administrative
2 orders by virtue of this letter, Exhibit 47?

3 MR. TENENBAUM: Can you read back the
4 question, please.

5 (The record was read.)

6 Same objection.

7 A. Yes.

8 Well, that is technical information,
9 you are technically not willing to comply with
10 the order.

11 BY MR. FORT:

12 Q. Where does it say that in this letter?

13 A. It says that you will start
14 implementing the order, and then you'll litigate
15 over the remedy.

16 Q. It doesn't say we are going to start.

17 It says that we will proceed to do the
18 work required by the orders, including all
19 design work, and thereby be in compliance until
20 the administrative orders are superseded by an
21 order of the court.

22 That is what it says, doesn't it, page
23 2, concluding sentence of Exhibit 47?

24 A. That is what I said, I said you will

1 start implementing the order.

2 MR. TENENBAUM: Objection to the selective
3 limitation.

4 MR. FORT: I will agree with counsel the
5 document speaks for itself.

6 I was concerned with his suggestion
7 that we were going to start and not pursue it.

8 Q. In fact, did not Pre Finish Metals,
9 Desoto and Insilco start their compliance with
10 the order by nominating the engineer, is that
11 correct?

12 MR. TENENBAUM: Same objection.

13 A. I wouldn't consider that starting.

14 BY MR. FORT:

15 Q. Well, isn't the first thing we were
16 supposed to do under the orders is to nominate
17 the engineer for approval by EPA?

18 MR. TENENBAUM: Same objection.

19 A. Well, since you didn't indicate you
20 would comply with the order, I can't see how you
21 can consider that starting any work under the
22 order.

23 BY MR. FORT:

24 Q. Did you ever send us a letter saying we

1 disapprove your designation of Dr. Ball?

2 A. Well, we never got to that because you
3 never indicated you had complied with the order.

4 Q. Did you send us a letter before January
5 19, 1990 saying don't even bother to nominate
6 your engineer, we are not interested?

7 A. Of course not.

8 Q. Okay.

9 In fact, you knew three weeks earlier
10 with the December 29 letter what you viewed our
11 position to be, correct?

12 MR. TENENBAUM: Objection.

13 A. I don't know what you are talking
14 about.

15 BY MR. FORT:

16 Q. Didn't you get Exhibit 46, the December
17 29 letter?

18 A. I don't know what you are talking
19 about.

20 Q. When did you get, first see Exhibit No.
21 46, dated December 29, 1989?

22 A. I think it was probably December 29 or
23 maybe a few days afterwards.

24 Q. Okay.

1 So you had this letter for three weeks,
2 almost three weeks, and did not tell the
3 respondents don't even bother to nominate your
4 engineer, correct?

5 MR. TENENBAUM: Objection.

6 A. Wait a minute now. Your first letter
7 doesn't name the engineer. It is the second.

8 BY MR. FORT:

9 Q. I know. We told you what we were going
10 to do on December 29, that is Exhibit 47, as to
11 Desoto Insilco and others, correct? Is that
12 right?

13 A. What was your question?

14 MR. TENENBAUM: Asked and answered.

15 BY MR. FORT:

16 Q. That is a good one.

17 You saw Exhibit No. 46 on or about
18 December 29, 1989, correct?

19 A. On or afterwards, yes.

20 Q. Okay.

21 Between that date, the first thing that
22 the respondents were supposed to do under the
23 administrative orders was to nominate an
24 engineer, correct?

1 MR. TENENBAUM: Objection. Asked and
2 answered. Asked and answered.

3 BY MR. FORT:

4 Q. You can answer.

5 A. That's correct.

6 Q. Okay.

7 And that was basically three weeks
8 after we were supposed to give you our so-called
9 intent to comply letter?

10 A. I would have to look at the order.

11 Q. Okay.

12 Between December 29 and January 19, did
13 you or are you aware of the Agency sending any
14 correspondence to the respondents saying do not
15 bother to nominate an engineer, we are not going
16 to proceed with allowing you to comply with the
17 administrative orders?

18 A. We didn't send any letter like that.
19 We sent you a letter asking for clarification,
20 because you didn't indicate compliance with the
21 order.

22 Q. When did you send that letter?

23 A. I don't know. I would have to look it
24 up.

1 Q. Was it before or after --

2 A. They were also some verbal
3 communications also.

4 Q. Did you talk to anybody for Desoto?

5 A. Did I personally talk to anybody?

6 Q. Yes.

7 A. No.

8 Q. Do you know if any of your colleagues
9 talked to anybody with Desoto or representing
10 Desoto?

11 A. I would have to discuss it with my
12 colleagues.

13 Q. Do you know if this other communication
14 occurred before or after January 19, 1990, the
15 date of the Exhibit 47 letter?

16 A. I would guess, I believe it occurred
17 before.

18 Q. How would you know whether or not it
19 did or not?

20 A. I would have to go --

21 MR. TENENBAUM: He told you he was guessing.
22 Do you want him to guess?

23 A. We are continuing to ask questions
24 about --

1 MR. TENENBAUM: I don't think he wants you
2 to guess. Just state what you know.

3 BY MR. FORT:

4 Q. No, he doesn't recall.

5 I want to know what kind of
6 documentation might refresh his recollection?

7 A. I would have to go back and look at the
8 files and discuss it.

9 Q. Is there anything in the administrative
10 record that would refresh your recollection on
11 that issue?

12 A. No.

13 MR. FORT: Counsel, we have asked on behalf
14 of Desoto for documentation such as this, both
15 in terms of our discovery request and in terms
16 of our 30 (b) 6.

17 We have no other documentation of any
18 sort, whether it is a telephone memo or
19 whatever. Are you representing to us that there
20 is no other documentation?

21 MR. TENENBAUM: Documentation on what was
22 that?

23 MR. FORT: That he just referred to.
24 Anything in his files about when letters were

1 sent or telephone calls were made, or whatever.

2 Q. Mr. Boice, are there such documents?

3 MR. TENENBAUM: Let me just --

4 You don't have copies of letters that
5 were sent to you?

6 MR. FORT: I don't know what letter he is
7 talking about that predates January 19, 1990, if
8 there is a letter.

9 MR. TENENBAUM: It says January 9 right in
10 the second letter. It says there is a January 9
11 letter.

12 A. Right.

13 It says we sent you a letter dated
14 January 9, 1990.

15 BY MR. FORT:

16 Q. Is that the only documentation that you
17 are aware of is the January 9, 1990 letter?

18 MR. TENENBAUM: Through January 19?

19 A. I would have to look. I would have to
20 check around.

21 BY MR. FORT:

22 Q. Is there any documentation in the files
23 other than -- is this January 9, 1990 letter in
24 the administrative record?

1 A. No.

2 Q. These documents are also not in the
3 administrative record, correct?

4 A. No.

5 Q. Why are they not in the administrative
6 record?

7 A. Because the --

8 MR. TENENBAUM: Hold it a second.

9 Discovery into the compilation of the
10 administrative record is not a permissible
11 question. Let me object to it.

12 MR. FORT: I don't care if it is an
13 administrative record or production of
14 documents. We didn't --

15 MR. TENENBAUM: They are your letters.

16 MR. FORT: I am not asking you to produce
17 these letters. I am not asking for that. Nor
18 am I asking for the January 9 letter.

19 But, I am curious as to why these
20 documents are not in the administrative record
21 for the unilateral administrative orders.

22 MR. TENENBAUM: Is it your position that
23 your compliance with those orders should be
24 judged on the basis of the administrative

1 record?

2 MR. FORT: That's your position, not mine.

3 MR. TENENBAUM: I didn't take any position
4 on the issue of compliance.

5 MR. FORT: Counsel, you have objected on
6 sufficient cause and everything else, including
7 penalties, of going beyond that record.

8 I am a little bit surprised at your
9 position here.

10 MR. TENENBAUM: I haven't stated what my
11 position is. But, I don't hear you asking about
12 sufficient cause and penalties. I hear you
13 asking about something else.

14 A. The record is for the issuance of the
15 order.

16 BY MR. FORT:

17 Q. Okay.

18 A. It is documents considered or relied
19 upon for the issuance of the order.

20 Q. Okay.

21 Do you agree with the statement made in
22 this Exhibit 47, that is, in the second
23 paragraph, the January 19 letter, it is the
24 sixth line down:

1 "However, as we
2 have discussed, the orders
3 do not preclude us from
4 investigating, proposing a
5 ground water discharge
6 alternative, in addition to
7 those options already
8 identified in the orders."?

9 MR. TENENBAUM: Which part of that are you
10 asking him if he agrees with, whether there were
11 discussions with Mike Berman?

12 MR. FORT: As to the second part as to the
13 orders.

14 MR. TENENBAUM: You are asking for him to
15 interpret the orders?

16 MR. FORT: He said he wrote them, so I think
17 that is a fair question.

18 MR. TENENBAUM: I will object. That calls
19 for a legal conclusion.

20 BY MR. FORT:

21 Q. Mr. Boice, do the orders prohibit the
22 respondents from investigating things in
23 addition to the specific things required to be
24 investigated under the orders in terms of the

1 design work?

2 MR. TENENBAUM: If you know the answer, you
3 can answer it, but same objection.

4 A. No.

5 BY MR. FORT:

6 Q. They do not prohibit other activities,
7 right?

8 A. No.

9 Q. Okay.

10 So as to investigating additional
11 ground water discharge alternatives, options,,
12 that is not inconsistent with the order, is it?

13 MR. TENENBAUM: Same objection.

14 A. No.

15 BY MR. FORT:

16 Q. Okay.

17 Now, as to the next sentence, with
18 regard to soil solidification:

19 "Work on the design
20 for this remedy shall also
21 proceed in accordance with
22 the orders."

23 Work on the design for solidification
24 proceeding in accordance with the orders is also

1 consistent with the orders, isn't it?

2 MR. TENENBAUM: Same objection.

3 A. That is in accordance with the orders,
4 yes.

5 BY MR. FORT:

6 Q. Okay.

7 So, isn't it true that the real
8 difficulty here is the final paragraph, which
9 talks about proceeding to comply with the orders
10 until there is a trial, and until there is a
11 decision by the court which supersedes the
12 orders, correct?

13 MR. TENENBAUM: Same objection.

14 A. That is basically correct. Yes. You
15 were going to litigate the remedy, basically.

16 BY MR. FORT:

17 Q. Do you believe that that action is
18 inconsistent with the partial consent decree?

19 MR. TENENBAUM: Same objection.

20 A. What action?

21 BY MR. FORT:

22 Q. The action to comply with the orders
23 and also litigate at the same time.

24 MR. TENENBAUM: Same objection.

1 A. What partial consent decree? You mean
2 the 1985 partial consent decree?

3 BY MR. FORT:

4 Q. Yes.

5 MR. TENENBAUM: Do you want his legal
6 interpretation of the decree, is that what you
7 want?

8 MR. FORT: His belief.

9 MR. TENENBAUM: Same objection.

10 MR. FORT: His belief.

11 MR. TENENBAUM: If you have a legal belief
12 on the meaning of the decree, I suppose you can
13 answer.

14 MR. FORT: He has to have a working
15 understanding of the decree. It has been
16 governing his activities at the site for several
17 years now.

18 MR. TENENBAUM: Same objection.

19 A. Well, I am not an attorney. But, it
20 does state in the decree that we reserve our
21 rights under Section 106. Something to that
22 effect.

23 BY MR. FORT:

24 Q. Your rights under 106 are, you believe,

1 to issue unilateral administrative orders?

2 MR. TENENBAUM: Same objection.

3 A. Under Section 106. Right.

4 BY MR. FORT:

5 Q. Okay.

6 There is another part of the decree
7 that says there will be a trial within a certain
8 period of time if there is no agreement on a
9 remedy, correct?

10 MR. TENENBAUM: Same objection.

11 A. That's correct.

12 BY MR. FORT:

13 Q. Okay.

14 So, do you believe that the action of
15 proceeding to litigate the issues in dispute is
16 inconsistent with compliance with the unilateral
17 administrative orders?

18 MR. TENENBAUM: Same objection.

19 A. Yes.

20 BY MR. FORT:

21 Q. What is the basis for that view?

22 MR. TENENBAUM: Same objection.

23 A. What is the question, the basis of the
24 view?

1 BY MR. FORT:

2 Q. Maybe you didn't understand my question
3 the first time.

4 Would you read back the question to
5 which the witness answered yes.

6 (The record was read.)

7 MR. TENENBAUM: Same objection.

8 I will add the objection that you made,
9 your question is vague and ambiguous because it
10 is not specified about when you were talking
11 about litigating them.

12 MR. FORT: All right. I will rephrase the
13 question.

14 MR. TENENBAUM: And also whether or not you
15 are talking about litigating at the same time
16 you are talking complying.

17 MR. FORT: I am talking about litigating at
18 the same time as compliance.

19 Q. Do you believe that the actions
20 expressed here by Pre Finish Metals, and Insilco
21 Corporation, and Desoto, at least as to
22 Desoto -- I don't answer as to the other two --
23 as to Desoto, of intending to comply with the
24 orders and at the same time proceeding to

1 exercise rights to a trial under the partial
2 consent decree is a violation, concurrently is a
3 violation of the unilateral administrative
4 orders?

5 MR. TENENBAUM: That is to litigate before
6 you have completed?

7 MR. FORT: While we are doing the design
8 work, while we are proceeding to comply.

9 MR. TENENBAUM: Same objection.

10 You can answer, if you know the answer.

11 A. Yes.

12 You weren't will to implement the
13 remedy. Basically you weren't willing to
14 implement the unilateral order because you
15 wanted to litigate the remedy.

16 BY MR. FORT:

17 Q. So in your view the partial consent
18 decree reserves EPA rights to issue a 106 order,
19 but you can ignore the rights to a trial at the
20 same time?

21 MR. TENENBAUM: Objection.

22 A. No. You can have your trial on other
23 issues.

24

1 BY MR. FORT:

2 Q. The consent decree says --

3 A. Or you cannot comply with the order and
4 then you will have the trial.

5 Q. The consent decree says that the trial
6 will be held within, I think it is, eleven
7 months of the time that there is a -- 270 days
8 of the times that there is a breakdown in
9 settlement negotiations.

10 Do you accept that time period?

11 MR. TENENBAUM: Objection. You are mixing
12 apples and oranges.

13 BY MR. FORT:

14 Q. You may answer.

15 A. I don't think it is my place to accept.
16 It is the court sets the schedule.

17 Q. The consent decree sets the schedule?

18 MR. TENENBAUM: Objection.

19 A. What is your question?

20 MR. TENENBAUM: Hold on. The question is
21 vague and ambiguous, because you are not making
22 clear at this point -- you are not making clear
23 as to what you are talking about in terms of
24 complying or not complying and so on.

1 The issues have all been briefed and
2 are before the court.

3 BY MR. FORT:

4 Q. I am asking for this witness.

5 Somebody is going to have to say that
6 we are not in compliance. And I haven't heard
7 anything yet as to how we are not in compliance.

8 A. Wait a minute. I said a lot of things
9 that you are not, that is what we have been
10 talking about for the last hour. How can you
11 say we haven't talked about that?

12 Q. Okay. We will let the transcript deal
13 with that issue here.

14 Let's mark this as, these as 48 and 49.

15 (The documents above-referred to
16 were marked Boice Deposition
17 Exhibit Nos. 48 and 49, respectively,
18 for identification.)

19 Mr. Boice, I would like you to look at
20 what we have marked as Exhibits 48 and 49.

21 Exhibit 48 is a document that begins
22 with a Bates stamp at the bottom of 2000354.
23 The date isn't very legible. It is called an,
24 "Action memorandum - Ceiling increase request

1 for the removal action at the Midco II site,
2 Gary, Indiana."

3 And Exhibit 49 is a similar type of
4 memorandum, with a December 1989 date on it.

5 Mr. Boice, why don't you take a minute
6 to look at those documents.

7 (Whereupon a short recess was had.)

8 Okay?

9 A. Okay.

10 Q. Back on the record.

11 Mr. Boice, you have had a chance to
12 look at Exhibits 48 and 49?

13 A. Yes.

14 Q. These documents we obtained from your
15 administrative record. I can't read the date of
16 Exhibit 48 at the top. It looks like it is
17 something July 1988.

18 A. 11.

19 Q. You believe it is July 11, 1988?

20 A. Yes.

21 Q. Do you know who prepared this document?

22 It is only signed by Mr. Adamkus, the
23 regional administrator. I doubt that Mr.
24 Adamkus is in the habit of authoring these

1 things.

2 Do you know who prepared this document,
3 Exhibit 48?

4 MR. TENENBAUM: Is this relevant to a
5 non-record issue?

6 MR. FORT: It is relevant to the issue of
7 costs and potential liability, but certainly the
8 issue of costs.

9 I couldn't find the dollars that are
10 talked about this document being included in
11 what was available to me before late yesterday
12 as a cost item, so it relates to the cost.

13 MR. TENENBAUM: Is it all right with you if
14 he says who prepared the cost portion?

15 MR. FORT: I don't care.

16 MR. TENENBAUM: The cost portion.

17 A. Who prepared?

18 MR. TENENBAUM: The cost information.

19 A. It was prepared by our -- what is it
20 called -- the group that does immediate removal
21 actions, emergency response branch.

22 BY MR. FORT:

23 Q. Okay.

24 A. Probably the cost estimates were

1 prepared by their technical assistance team,
2 with support from the technical assistance team
3 contractor.

4 Q. The emergency response branch is not
5 your branch, correct?

6 A. Correct.

7 Q. Okay.

8 Who would have signed off on this
9 document before Mr. Adamkus signed it?

10 Who would have had to have approved
11 this document before Mr. Adamkus approved it.

12 MR. TENENBAUM: The cost part?

13 MR. FORT: Yes.

14 MR. TENENBAUM: If you know.

15 A. Signed off by the coordinator, the
16 Illinois-Indiana coordinator, probably.

17 BY MR. FORT:

18 Q. Who was that person at that time?

19 A. I'm not sure. It might have been Judy
20 Beck.

21 And before then Bob Bowden or, I mean,
22 Constantelos, Basil Constantelos, okay, division
23 director.

24 Q. So Mr. Constantelos, who has signed

1 these unilateral orders, would have had also had
2 to have approved of this memorandum before it
3 was sent in?

4 A. Probably.

5 Q. Did the emergency response branch
6 coordinate with you at all in terms of what was
7 going on at the site or the conditions at the
8 site?

9 MR. TENENBAUM: You have now left costs?

10 MR. FORT: I am trying to figure out if
11 these costs are the same as his costs.

12 I am trying to figure out where this
13 thing came from.

14 MR. TENENBAUM: Your question is whether
15 these cost are reflected in the cost documents
16 he gave you yesterday?

17 MR. FORT: I will get to that. But just let
18 me ask the question. That is where I am going.
19 But, I am trying to figure out what is going on
20 here.

21 MR. TENENBAUM: Well, if these people had
22 communications with you as to the costs of their
23 work they were doing, tell him.

24 A. No.

1 It was developed independently by the
2 emergency response branch.

3 BY MR. FORT:

4 Q. Okay.

5 Do you know if the dollars talked about
6 here which would -- talked about are 2.877
7 million. Strike that.

8 Do you know if this Exhibit 48 was
9 approved by the people in Washington, Mr.
10 Porter?

11 A. I don't know whether it was or not.

12 Q. This document indicates that there was
13 already authorized funds of \$2,887,800, which
14 had been approved December 24, 1986. Directing
15 your attention to the first paragraph of Exhibit
16 8.

17 A. Yes.

18 Q. Do you know if the any of that 2.8
19 million-plus dollars had been spent as of the
20 date of this document, July of '88?

21 MR. TENENBAUM: Objection, no foundation.

22 A. Whether any of this 2.8 million dollars
23 had been spent?

24 BY MR. FORT:

1 Q. Yes.

2 A. Yes.

3 Q. What had been spent, or do you know
4 what activities had been conducted that would
5 have been charged against this 2.8 million
6 dollars?

7 A. Well, that included according to this,
8 including removal of burnt out drums from the
9 site, ten above ground storage tanks. And
10 removal from the site of drums that contained
11 chemical wastes, including PCBs.

12 And then on a separate, another action,
13 they excavated a sludge pit and filter bed that
14 was used for disposal of wastes. And those were
15 at this date at least partially taken off the
16 site.

17 Q. Do you know whether or not the costs
18 that are reflected in this document, Exhibit 48,
19 have been picked up in the cost documentation
20 that you brought with you yesterday?

21 A. Yes. It should be in the cost
22 documentation.

23 Q. So the activities covered in this
24 memorandum are those -- at least the ones that

1 had been previously authorized -- are included
2 in the monies that you are seeking to recover in
3 this litigation now, correct?

4 A. Correct.

5 MR. TENENBAUM: From who?

6 MR. FORT: From the defendants.

7 MR. TENENBAUM: Well, different monies are
8 being sought against different defendants. I
9 don't know if that applies to here.

10 MR. FORT: Q. It was a general question.
11 There may be pieces that go different ways.

12 MR. TENENBAUM: Well, it isn't in
13 conformance with the pleading if you don't ask
14 him which defendants. The materials he gave you
15 yesterday had two parts to it. You are not
16 differentiating, but go ahead.

17 BY MR. FORT:

18 Q. Mr. Boice, is any of the money that has
19 been spent as reflected in this document, items
20 that the government is seeking to recover from
21 Desoto and the other defendants at this time in
22 this case?

23 A. We are, Desoto is included in that.
24 Yes.

1 Q. Okay.

2 How much of this 2.8 million dollars is
3 money that you are trying to recover from Desoto
4 and the other defendants in this case?

5 A. Well, some of this was covered under
6 the 1985 consent decree.

7 O. Let me ask that question.

8 How much of the 2.8 million dollars
9 were covered by the 1985 consent decree?

10 A. I would have to look it up in our
11 costs.

12 Q. To understand that, you would have to
13 go to the cost summary documents that you gave
14 us yesterday?

15 A. Yes.

16 Q. Okay.

17 A. It is labeled there under the ERCS
18 contract.

19 Q. I am sorry, under which contracts?

20 A. ERCS. E-R-C-S.

21 Q. What does that stand for?

22 A. I don't know.

23 Q. Okay.

24 When you were collecting documents, did

1 you obtain this document from the emergency
2 response branch?

3 A. This document would have been from the
4 emergency response branch. Yes.

5 Q. And you know that it came from their
6 files?

7 A. Probably. At least it originated from
8 their files.

9 Q. Okay.

10 And it is your testimony that this
11 document is a document that was prepared by one
12 or more appropriate individuals in the emergency
13 response branch, correct?

14 A. Yes.

15 Q. Do you know whether or not this
16 document was considered by Mr. Constantelos when
17 he signed the unilateral administrative orders?

18 A. Well, it was. If it was in the
19 administrative record, it was considered.

20 Q. Is Exhibit 49 apparently an earlier
21 version of the same document that came to be --

22 MR. TENENBAUM: Excuse me. He had answered,
23 but I do want for the record state my objection
24 to the last question.

1 I think it is discovery into record
2 discovery matters, but go ahead.

3 BY MR. FORT:

4 Q. Is Exhibit 49 just an earlier draft of
5 the same request as we find in Exhibit 48?

6 A. It appears to be. Once it goes over \$2
7 million, the document has to be approved by
8 headquarters, J. Winston Porter. So, it is
9 possible that the first one was never approved.

10 Q. You don't think that this is two
11 different requests; you think they are just the
12 same basic request to removal additional
13 material from the Midco 2 site?

14 A. That is what it looks like from my
15 preliminary review of the document, my brief
16 review of the document.

17 Q. When was the first time that you
18 personally saw this document, Exhibit No. 48 or
19 Exhibit No. 49 for that matter, the earliest
20 that you saw either of those documents?

21 A. I'm sure I have seen them before, but I
22 don't know.

23 Q. Did you see them in early 1988?

24 A. I don't know.

1 Q. Mr. Adamkus signed this as the regional
2 administrator; is that correct?

3 A. Yes.

4 Q. And he is the same person that signed
5 the record of decision here?

6 A. That's correct.

7 Q. Do you know if this document was ever
8 provided to ERM or to the Midco trustees before
9 its inclusion in the administrative record?

10 A. I don't think it was, no.

11 Q. Okay.

12 A. Not that I know of.

13 Q. Okay.

14 And your testimony is that these costs
15 would be reflected in the cost documents that
16 you brought with you yesterday, correct?

17 A. That's correct.

18 MR. FORT: Okay.

19 I have more questions on the cost
20 issue. But, I think it would be fruitless for
21 me to go through those cost issues until we have
22 had a chance to look at them. And maybe Mr.
23 Karaganis' questions next week will resolve all
24 those questions.

1 So with that, subject to the resolution
2 of the various motions on the scope that this
3 deposition can take, I think it is the best use
4 of everybody's time to let somebody else ask
5 some questions.

6 So I want to make sure you understand,
7 Mr. Tenenbaum, that I am reserving rights to ask
8 further questions after the court resolves it,
9 and certainly on the cost information.

10 And I will talk with my co-counsel and
11 will try to share notes, so that I will not have
12 to ask any other questions that they are
13 intending to ask.

14 But, I reserve the right to defend my
15 client and ask the questions I feel need to be
16 asked, if that is necessary. But, if we get to
17 that point, then we can argue about it.

18 MR. TENENBAUM: The cost issues?

19 MR. FORT: Any other issues that I may not
20 have covered.

21 MR. TENENBAUM: We reserve the right to
22 object to that.

23 MR. FORT: I understand you do.

24 MR. TENENBAUM: You have had two chances at

1 the witness.

2 MR. FORT: Not covered by what we have
3 talked on today, of course, is your instructions
4 on the Desoto waste materials. Let me ask one
5 question on that.

6 Q. Mr. Boice, do you plan to review the
7 Desoto documentation, either the 104 E response,
8 the permit application, or anything else prior
9 to trial?

10 MR. TENENBAUM: Objection.

11 A. I don't have any plan.

12 MR. FORT: Okay.

13 If those plans change, we would request
14 that --

15 MR. TENENBAUM: He said he didn't have any
16 plans one way or the other.

17 MR. FORT: I just asked if those plans
18 change that you let us know. This witness has
19 no firsthand knowledge, he is not planning on
20 reviewing anything.

21 MR. TENENBAUM: He didn't say. He had no
22 plans one way or the other. He didn't say he
23 was not planning on it. He has no plans one way
24 or the other.

1 A. I have no plans one way or the other.

2 BY MR. FORT: If your plans change and you
3 do have plans, we would request the opportunity
4 to continue that line of questioning.

5 But, for the moment I have nothing
6 further. Thank you.

7 Do you want to take a lunch break right
8 now?

9 MR. TENENBAUM: Off the record.

10 (Discussion had off the record.)

11 DIRECT EXAMINATION

12 BY MR. ADAMS:

13 Q. Mr. Boice, my name is John Adams. I am
14 one of the attorneys that is handling the case,
15 the third-party case for the third-party
16 defendants. And I just have a few questions
17 relating to the third parties.

18 Several times in your testimony you
19 have used the term Dehart documents, which you
20 explained were shipping papers, check stubs and
21 similar documents; is that correct?

22 A. That's correct.

23 Q. I will use the term Dehart documents in
24 my questioning, and I mean by that term the same

1 thing that you meant by it when you used it.

2 Does the EPA have in its possession at
3 this time the original Dehart documents?

4 A. I believe it does.

5 Q. Do you know when the EPA obtained those
6 documents?

7 A. I don't know exactly when it was.

8 Q. Do you know from whom EPA obtained
9 those documents?

10 A. No, I don't.

11 I presume it was from Ernest Dehart.

12 Q. Do you know who in EPA would have
13 knowledge of the circumstances under which these
14 documents were obtained by EPA?

15 A. Yes.

16 Q. Who would that be?

17 A. Counsel.

18 Q. Mr. Berman?

19 A. Yes.

20 Q. Just for the record, you do not -- do
21 you have here in this room the Dehart documents?

22 A. We have got a copy of the Dehart
23 documents. Yes.

24 Q. But not the originals?

1 A. No.

2 Q. Is that all of the Dehart documents or
3 only those that relate to the defendants?

4 A. It is only the ones related to the nine
5 generator defendants, not all of them.

6 MR. BERMAN: Can we go off the record for a
7 minute?

8 MR. ADAMS: Sure.

9 (Discussion had off the record.)

10 A. No, that's right. We have got all the
11 Dehart documents here.

12 MR. TENENBAUM: Off the record for a second.

13 (Discussion had off the record.)

14 MR. ADAMS: Let's go back on the record,
15 then.

16 Q. In the list of documents comprising the
17 record, specifically the liability documents,
18 there is a designation of shipping documents for
19 Midco, including Midco pickup tickets, generator
20 tally and trade tickets, invoices, checks,
21 receipts, purchase orders, shipping orders.

22 Are those the same as what you have
23 been referring to as the Dehart documents?

24 A. Those are the Dehart documents and the

1 Intec documents. The Intec documents were from
2 the Intec operation.

3 Q. Now, are all of those documents part of
4 the administrative record, including documents
5 relating to parties other than the defendants?

6 MR. TENENBAUM: Objection.

7 You can answer.

8 A. They are part of the administrative
9 record for the unilateral administrative order.

10 MR. TENENBAUM: Is your question for
11 defendants or for third-party defendants?

12 MR. ADAMS: For both.

13 I asked if all of the documents are
14 part of the record, including documents relating
15 to defendants and third-party defendants.

16 MR. TENENBAUM: All right.

17 BY MR. ADAMS:

18 Q. To your knowledge, has EPA served 104 E
19 requests on parties other than the defendants?

20 A. No, we haven't.

21 Q. You have not?

22 A. 104 E requests?

23 Q. Yes.

24 A. Yes, we have.

1 On all PRP's that we have identified
2 and could locate.

3 Q. Do you know when that was done?

4 A. Most of them were sent out in 19 -- I
5 think it was 1982.

6 Q. Were any sent out more recently than
7 1982?

8 A. Yes.

9 There were -- there is one sent to the
10 Indiana Department of Highways. And I think it
11 was in 1987.

12 And also in the same year, I think it
13 was the same year, we sent one to Samocki
14 Brothers Industrial Waste Disposal Corporation.
15 And US Reduction.

16 Q. Aside from the parties that you just
17 mentioned, have you sent 104 E requests to any
18 parties that were not identified as PRP's in
19 1982?

20 MR. TENENBAUM: Can you read back that
21 question, please.

22 (The record was read.)

23 A. No, I don't think we have.

24 BY MR. ADAMS:

1 Q. Did you receive responses to the 104 R
2 requests from Samocki Brothers and US Reduction?

3 A. We received one from US Reduction. And
4 Samocki Brothers, I don't remember whether we
5 received one or not.

6 MR. TEPENBAUM: Off the record for a second,
7 please.

8 (Discussion had off the record.)

9 BY MR. ADAMS:

10 Q. In addition to what you have called the
11 Dehart documents, there is another document
12 referred to as the Midco log. I don't know if
13 you intended to include that among the Dehart
14 documents?

15 A. Yes.

16 Q. Does EPA have the original of the Midco
17 log?

18 A. I believe we do.

19 Q. And would that have been --

20 A. I'm not sure, but I believe we do.

21 Q. I am referring now to what has
22 previously been identified as Exhibit 28, this
23 is a memorandum of Mr. Berman on his interview
24 with Ron Crouch. I will show it to you to

1 refresh your memory.

2 In the fifth paragraph, there is a
3 reference to a card file attached to the back of
4 the log.

5 Are you acquainted with that document?

6 A. I have seen those. Yes, I remember
7 seeing those. Yes.

8 Q. Do you know if EPA has that original
9 card file?

10 A. I believe we do, but I don't know for
11 sure.

12 Q.

13 MR. ADAMS: That is all I have.

14 MR. TENENBAUM: We will break for lunch.

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17 (Whereupon a recess was taken
18 until 1:30 o'clock p.m. of
19 the same day.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MIDWEST SOLVENT RECOVERY INC.;
MIDWEST INDUSTRIAL WASTE DISPOSAL
COMPANY, INC.; INDUSTRIAL TECTONICS,
INC.; V & F CORPORATION; ERNEST DE
HART; EDWARD D. CONLEY; HELGA C.
CONLEY; LOVIE DE HART; CHARLES A.
LICHT; DAVID E. LICHT; DELORES LICHT;
EUGENE KLISIAK; JEANETTE KLISIAK;
LUTHER G. BLOOMBERG; ROBERT J. DAW-
SON, JR.; JOHN MILETICH; MARY
MILETICH; PENN CENTRAL CORPORATION;
INSILCO CORPORATION; RUST-OLEUM, INC.;
ZENITH RADIO CORPORATION; STANDARD T
CHEMICAL COMPANY, INC.; AMERICAN CAN
COMPANY, INC.; PRE FINISH METALS, INC.;
PREMIER COATINGS, INC.; MOTOROLA, INC.;
and DESOTO, INC.;

Defendants.

AMERICAN CAN COMPANY, INC.,
DESOTO, INC., INSILCO CORPORATION,
MOTOROLA, INC., PRE FINISH METALS,
INC., PREMIER COATINGS, INC.,
RUST-OLEUM, INC., STANDARD T
CHEMICAL COMPANY, INC.,
ZENITH RADIO CORPORATION, JOHN
MILETICH, MARY MILETICH and THE
PENN CENTRAL CORPORATION,

Third-Party Plaintiffs,

vs.

ACCUTRONICS, ACTIVE SERVICE CORP.,
AMERICAN NAMEPLATE & DECORATING CO.,

) Civil Action
) No. H-79-556
) Third-Party
) Complaint

1 AMERICAN PRINTER & LITHOGRAPHER CO.,)
 2 AMERICAN RIVET COMPANY, APECO,)
 3 APPROVED INDUSTRIAL REMOVAL, INC.,)
 4 ARMOUR PHARMACEUTICAL, ARTISAN HAND)
 5 PRINTS, ASHLAND CHEMICAL CO.,)
 6 AVENUE TOWING COMPANY, BARR &)
 7 MILES, INC., BELDEN ELECTRICAL)
 8 PRODUCTS DIV. OF COOPER INDUSTRIES,)
 9 INC., BRETFOED MANUFACTURING, INC.,)
 10 BUTLER SPECIALTY COMPANY, INC.,)
 11 BY PRODUCTS MANAGEMENT, CALUMET)
 12 CONTAINER, CARGILL, INC.,)
 13 CHEMALLOY DIVISION OF FISHER- CALO)
 14 CHEMICAL CO., CHICAGO ETCHING CORP.,)
 15 CHICAGO NAMEPLATE COMPANY,)
 16 CHICAGO ROTOPRINT CO.,)
 17 C & C INDUSTRIAL MAINTENANCE CORP.,)
 18 CITY OF GARY, INDIANA, C.P. CLARE)
 19 DIVISION OF GENERAL INSTRUMENTS)
 20 CORP., C.P. HALL CO.,)
 21 C.P. INORGANICS, COMMANDER PACKAGING,)
 22 CONNOR FOREST INDUSTRIES, CONSERVA-)
 23 TION CHEMICAL, CONSUMERS PAINT)
 24 FACTORY, INC., CONTINENTAL)
 WHITE CAP DIVISION OF CONTINENTAL)
 CAN COMPANY, CONVERSIONS BY GERRING,)
 COUNTY OF DU PAGE, ILLINOIS,)
 CRONAME, INC., CROWN CORK & SEAL)
 CO., INC., CULLIGAN INTERNATIONAL)
 COMPANY, CULLIGAN WATER CON-)
 DITIONING, INC., FRANK J. CURRAN,)
 CUSTOM METALS PROCESSING,)
 DAP, INC. OF BEECHAM COSMETICS,)
 DAUBERT CHEMICAL COMPANY,)
 DEUBLIN COMPANY, DOBSON CONSTRUCTION)
 INC., DUO FAST CORPORATION, DU-TONE)
 CORP., HAROLD EGAN, EKCO HOUSEWARE)
 CO., EL-PAC, INC., EMBOSOGRAPH DIS-)
 PLAY MFG. CO., ESS KAY ENAMELING, INC.,)
 ETHICON, INC., FELT PRODUCTS MFG. CO.,)
 FLINT INK CORP., FURNAS ELECTRIC)
 CO., GEARMASTER DIVISION, EMERSON)
 ELECTRIC, THE GILBERT & BENNETT)
 MFG. CO., GLD LIQUID DISPOSAL,)
 HENRY PRATT COMPANY, J.M. HUBER)
 CORPORATION, HYDRITE CHEMICAL CO.,)
 INTAGLIO CYLINDER SERVICE, INC.,)

1	JOHNSON & JOHNSON, J & S TIN MILL)
	PRODUCTS, KNAACK MFG. CO., LANSING)
2	SERVICE CORPORATION, LAUTTER)
	CHEMICAL, LIQUID DYNAMICS,)
3	LIQUID WASTE, INCORPORATED,)
	STEVE MARTEL, MASONITE CORPO-)
4	RATION, MCWHARTER CHEMICAL CO.,)
	METAL RECLAIMING CORPORATION,)
5	METROPOLITAN CIRCUITS,)
	MIDWEST RECYCLING COMPANY, MONTGOMERY)
6	TANK LINES, MORTON THIOKOL INC.,)
	MR. FRANK, INC., NAMSCO, INC.,)
7	NATIONAL CAN CORPORATION, NAZ-DAR CO.,)
	NUCLEAR DATA, INC., PPG INDUSTRIES,)
8	INC., PASLODE COMPANY, PIERCE & STEVENS))
	CHEMICAL CORP., PIONEER PAINT PRODUCTS,)
9	PREMIER PAINT CO., PYLE-NATIONAL CO.,)
	R-LITE, REFLECTOR HARDWARE CORP.,)
10	REGAL TUBE, RELIANCE UNIVERSAL, INC.,)
	RICHARDSON GRAPHICS, JOHN ROSCO,)
11	ROZEMA INDUSTRIAL WASTE, ST. CHARLES)
	MANUFACTURING, SCHOLLE CORPORATION,)
12	SCRAP HAULERS, SHERWIN WILLIAMS)
	COMPANY, SHELCO COATINGS, INC.,)
13	SIZE CONTROL COMPANY, SKIL CORPORA-)
	TION, SPECIAL COATINGS CO.,)
14	SOUTHERN CALIFORNIA CHEMICAL,)
	SPECIALTY COATINGS, INC.,)
15	SPOTNAILS, INC., STAR TRUCKING, STERN)
	ELECTRONICS, INC., JOE STRAUSNICK,)
16	STUART CHEMICAL & PLANT, INC.,)
	SUMMER & MACE, SUN CHEMICAL,)
17	SYNTECH WASTE TREATMENT CENTER,)
	T.R.C., TEEPACK, INC., ALFRED TENNY,)
18	THIELE-ENGDAHL, INC., THOMPSON)
	CHEMICALS, TIFFT CHEMICALS,)
19	TOUNEY DISPOSAL, TRIPLE S. ETCHANTS,)
	UNIROYAL, INC., UNITED RESIN AD-)
20	HESIVES, INC., U.S. ENVELOPE, U.S.)
	SCRAP AND DRUM, U.S. STEEL CORP., UNI-)
21	VERSAL RESEARCH LABORATORIES, INC.,)
	UNIVERSAL TOOL & STAMPING COMPANY,)
22	VANDER MOULEN DISPOSAL, VELSICOL)
	CHEMICAL CORP., VICTOR GASKET)
23	DIVISION OF DANA CORPORATION,)
	WARNER ELECTRIC BRAKE & CLUCH CO.,)
24	WARWICK CHEMICAL, WASTE RESEARCH &)

1 RECYCLING, XEROX CORPORATION, and)
2 other unidentified persons,)

3 Third-Party Defendants.)
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9 DEPOSITION OF
10 RICHARD E. BOICE

11 July 6, 1990
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The continued deposition of RICHARD EDWIN BOICE, called for examination by the Defendants, pursuant to notice and pursuant to the provisions of the Federal Rules of Civil Procedure of the United States District Courts, pertaining to the taking of depositions for the purpose of discovery, taken before Arnold N. Goldstine, a Notary Public and Certified Shorthand Reporter within and for the County of Cook and State of Illinois, at 227 West Monroe Street, on July 6, 1990, commencing at the hour of 1:30 o'clock p.m.

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APPEARANCES:

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-and-

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-and-

Peter W. Moore
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appeared on behalf of
Scholle Corp.;

Mr. David S. Finch and
Mr. Harvey M. Sheldon
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Indianapolis, Indiana 46225

appeared on behalf of
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Inc., et al.;

1 APPEARANCES (CONTINUED):
2
3

4 Mr. John R. Adams
5 Taylor, Miller, Sprowl, Hoffnagle &
6 Merletti
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8 Chicago, Illinois 60602-2602

9
10 appeared on behalf of Third-
11 Party Plaintiffs Desoto, et al.;

12 Mr. Roy L. Bernstein
13 Gottlieb and Schwartz
14 200 East Randolph Street
15 Chicago, Illinois 60601

16
17 appeared on behalf of Third-party
18 Defendant By Products Management;

19 Mr. Blanton
20 Ice, Miller, Donadio & Ryan
21 One American Square
22 Box 82001
23 Indianapolis, Indiana 46282

24 appeared on behalf of
Indiana Department of Highways.

1 RICHARD BOICE,
2 having been previously duly sworn,
3 was examined and testified further as follows:

4 DIRECT EXAMINATION

5 BY MR. MADONIA:

6 Q. My name is Joe Madonia, and I am
7 representing the Penn Central Corporation. Let
8 the record reflect that this is the continuation
9 of the deposition of Mr. Boice.

10 Mr. Boice, during the course of your
11 involvement with the Midco I and II sites, have
12 you become aware of who owns the Midco I
13 property?

14 A. I am aware of some of the owners.

15 Q. Who do you know of that you would
16 classify as a land owner of the Midco I
17 property?

18 MR. TENENBAUM: Objection to the extent it
19 calls for a legal conclusion. But, you can
20 answer otherwise.

21 A. To my recollection, Ernest Dehart is
22 one land owner. V&E Corporation is another land
23 owner. And I'm not sure about the rest.

24 I think there is a couple names in my

1 mind, but I am not sure whether they are land
2 owners or associated with the site some other
3 way.

4 BY MR. MADONIA:

5 Q. What do you base --

6 A. Midco I, right?

7 Q. Correct.

8 What do you base your belief upon that
9 Ernest Dehart is an owner of property at Midco
10 I?

11 A. I have read it in a report.

12 Q. In a specific report?

13 A. Yes.

14 We did a property boundary survey and
15 it is in that report. I believe that is in the
16 administrative record.

17 Q. Did the Agency do the survey or did a
18 contractor?

19 A. A contractor conducted the survey for
20 the Agency.

21 Q. Do you know who it was?

22 A. Ecology & Environment.

23 Q. When did E&E do that survey of Midco I?

24 A. It was before the 1985 consent decree.

1 Around 1984, I believe.

2 Q. And did E&E then prepare a report
3 following that survey?

4 A. Yes.

5 Q. What generally was in that report, what
6 types of information?

7 A. There was a map showing the division of
8 the property ownership and identifying the
9 property owners. For Midco I and Midco II.

10 That was primarily what was in the
11 report.

12 Q. Is there any other document that you
13 are aware of that you have seen that leads you
14 to believe that Ernest Dehart is a property
15 owner at the Midco I site?

16 A. A title search was conducted also.

17 Q. Who did that?

18 A. I don't know, one of the law firms.

19 MR. TENENBAUM: I assume on these lines of
20 questioning, you just want the witness' personal
21 knowledge?

22 MR. MADONIA: Right.

23 MR. TENENBAUM: Okay.

24 A. I don't know the name of the firm that

1 conducted the title search. It is in the
2 administrative record, I think.

3 BY MR. MADONIA:

4 Q. Do you know who requested the title
5 search that was done?

6 A. Not for sure.

7 Q. Was there any sort of report or
8 document generated following that title search?

9 A. Yes. It is in the administrative
10 record.

11 Q. Did the same lawfirm prepare that
12 report that conducted the title search?

13 A. I'm not sure.

14 Q. So, you don't know who prepared the
15 report?

16 A. I don't know whether we have a report,
17 but we have a title search.

18 Q. Okay.

19 A. Whatever documentation there is with
20 the title search, there might have been a report
21 that accompanied it, I'm not sure.

22 Q. So other than the title search and the
23 related documents, and the report which E&E
24 prepared detailing the findings of their survey

1 of the Midco I site, are there any other
2 documents that you are aware of relating to
3 ownership of Midco I property?

4 A. Well, we might have information in
5 depositions, and responses to interrogatories,
6 requests for admissions, request to 104 E
7 requests.

8 Q. Do you recall any of these items or are
9 you just suggesting that those are
10 possibilities?

11 A. They are possibilities.

12 Q. But as of today, you don't specifically
13 remember that this type of information came up
14 in any of those contexts?

15 A. Not specifically, but I imagine
16 somebody -- I'm pretty sure, at least in a
17 deposition, somebody said something about who
18 owned the property at Midco I and at Midco II.

19 Q. You also mentioned V&E as another party
20 you believe owns Midco I property?

21 A. Yes.

22 Q. Is that belief on your part based on
23 the same information that we just discussed for
24 Mr. Dehart?

1 A. Yes.

2 Q. Okay.

3 As far as the other potential land
4 owners, are there documents that you could refer
5 to, to refresh your memory as to who they might
6 be?

7 A. I could look at the property survey
8 that was completed.

9 Q. The report that E&E prepared for Midco
10 I?

11 A. Yes.

12 Q. Would it also help to refer to the
13 title search then?

14 A. Yes.

15 Q. Did USEPA ever or did the government
16 ever contact Mr. Dehart about what was going on
17 on his property -- let me rephrase that.

18 When was the first time that you are
19 aware of that the government contacted Mr.
20 Dehart about what was going on on his property?

21 A. We responded to that in our answers to
22 the first set of interrogatories from the
23 generator defendants in 1985.

24 So if I could get that out, I could

1 refresh my memory.

2 MR. TENENBAUM: You only want him to testify
3 about what he knows personally, right?

4 I am not sure he was employed by the
5 Agency then.

6 MR. MADONIA: Let me ask this.

7 Q. Do you remember generally what the
8 nature of that initial contact was?

9 A. I believe it was an inspection.

10 Q. Okay.

11 If it was an inspection, how would Mr.
12 Dehart have been made aware of that inspection?

13 A. I presume that --

14 MR. TENENBAUM: Only what you know. Do you
15 want him to speculate?

16 BY MR. MADONIA:

17 Q. Under normal circumstances how would it
18 occur?

19 A. He would be contacted during the
20 inspection.

21 Q. How?

22 A. I'm not sure. Could either be over the
23 telephone or during the site visit.

24 Q. And the purpose of that contact would

1 be to let him know that an inspection was taking
2 place on his property?

3 A. Well, I should clarify. Whoever has
4 control or is operating the facility, it
5 wouldn't necessarily be Mr. Dehart.

6 Q. Whoever had control of the site?

7 A. Whoever is operating or had control of
8 the site, we would have to get permission to
9 enter the site from them.

10 Q. So if an inspection was taking place,
11 then, notice might not always be given to a land
12 owner if they weren't in obvious control of the
13 site, is that accurate?

14 A. That sounds accurate to me.

15 Q. Then you believe that Mr. Dehart's
16 first communication with the government about
17 government activity taking place at the Midco I
18 site might have been as a result of that sort of
19 an investigation or inspection, possibly?

20 MR. TENENBAUM: Government activity.

21 What do you mean, what are you
22 referring to?

23 BY MR. MADONIA:

24 Q. Mr. Dehart's first notice that USEPA

1 was conducting some sort of activity,
2 inspection, investigation, whatever they were
3 doing at the site, might have been as a result
4 of that sort of a contact then?

5 A. You are talking about USEPA, not all
6 governments?

7 Q. Let's limit it to USEPA.

8 A. USEPA, you restated what I just said.
9 That USEPA's first contact would have been an
10 inspection as far as I know, at least that is
11 my -- based on reviewing the record.

12 Q. As far as the other land owner of Midco
13 I property that you are currently aware of, V&E,
14 do you know what their first communication might
15 have been from USEPA regarding the Midco I site?

16 MR. TENENBAUM: Do you want him to answer
17 from personal knowledge or from reviewing
18 records?

19 MR. MADONIA: Either from personal knowledge
20 or if you don't remember specifically, how that
21 sort of a contact would normally be made.

22 A. All I know is that when they moved,
23 they tried to move barrels off of their property
24 with a bulldozer. We got involved with V&E

1 Corporation.

2 Q. When was that, approximately?

3 A. I imagine it was around 1978 or '79.
4 Probably 1979.

5 Q. If you were to refer to documents to
6 remind you specifically of what the very first
7 contact was that USEPA initiated with either Mr.
8 Dehart or V&E Corporation, what would those
9 documents be that you would have to refer to?

10 A. There was a similar question, although
11 not exactly the same question in the first set
12 of USEPA's first set of responses. USEPA's
13 responses to the first set of interrogatories
14 from the generator defendants that we prepared
15 in 1985.

16 And I went through all the documents at
17 that time to prepare those responses. So I
18 would go there first and I could review my
19 files.

20 There is also records in the court that
21 might not be present in my file.

22 Q. So you believe that a review of your
23 interrogatory answers would disclose
24 specifically when the first contact was that

1 USEPA made with Dehart and V&E?

2 A. With the Midco sites I'm sure.

3 But, as far as those specific people,
4 I'm not sure who would have a record of that or
5 indicate when that happened.

6 Q. Would all the documents that you can
7 think of that might help you remember that
8 specific information be included in the
9 administrative record?

10 A. No, because it was so long ago that a
11 lot of those documents weren't considered or
12 relied upon in the remedy selection process.
13 But, some of them probably are.

14 Q. If documents of that nature are not in
15 the administrative record, then other than
16 interrogatory responses or other pleadings filed
17 in this case, are there specific sources of that
18 information that you can tell me about, in other
19 words, where would they be, where else would
20 they be?

21 You mentioned your files.

22 A. Probably a lot of it is available in
23 the court documents. Otherwise, you could send
24 a Freedom of Information Act request to EPA.

1 But, you have got to make it specific enough
2 instead of asking for everything.

3 MR. TENENBAUM: We had document production
4 in this case as well.

5 A. That is true.

6 We sent almost all our documents to
7 some of the defendants, including all those
8 early ones.

9 BY MR. MADONIA:

10 Q. So some of the documents that you
11 referred to that might be in the administrative
12 record might, nonetheless, have been provided to
13 us in a document production?

14 A. Yes.

15 My understanding is that almost our
16 whole file was sent to some of the defendants.

17 Q. Moving on then to the Midco II site.
18 Let me ask you the same question that I started
19 with for Midco I.

20 Are you aware of property owners for
21 Midco II property?

22 A. Yes.

23 Q. Which property owners are you aware of
24 there?

1 A. I know Penn Central owns the back
2 portion of the site. And John Miletich, I
3 believe, owns the rest of the site, and his
4 wife. John Miletich and his wife.

5 Q. Could you describe for me a little bit
6 what you mean, what you mean by the back
7 portion?

8 A. Portions away from the highway.

9 Q. What is the division between the back
10 portion and the rest of the site?

11 A. I would have to look at the map from
12 the report prepared by E&E to show you where the
13 division of the boundary is approximately.

14 Q. Is that a division then that only
15 exists on paper?

16 A. There is no fence across that boundary.

17 Q. Has there ever been any physical
18 distinction between the property lines of
19 Miletich and Penn Central?

20 A. You mean like a fence or a barrier?

21 Q. Or anything that you can see that is a
22 distinction between two properties.

23 A. Not that I know of?

24 A. I have never seen it in any pictures.

1 Q. You have been to the site, haven't you?

2 A. Yes.

3 Q. That is what I was referring to.

4 If your standing on the site, can you
5 tell where one begins and where the other ends?

6 A. I am sure you can't now.

7 Back in I think the earliest I was on
8 the site was 1985, I didn't notice any division
9 then. And I looked at the aerial photos. And
10 if I remember right, I don't remember any
11 division on the aerial photos.

12 Q. So if there was a division, say for
13 instance, back in '75 or '77, '76 or '77, you
14 didn't yourself see the site to be able to know
15 what that division might have been; is that
16 accurate?

17 A. That is true. I wasn't on the site
18 that long ago.

19 Q. Could you tell me what you base your
20 conclusion upon?

21 Upon what do you base your conclusion
22 that Penn Central and the Miletich's own the
23 Midco II property?

24 A. It is the same as for Ernest Dehart,

1 that we have the title search and we have the
2 report by Ecology & Environment which provides
3 maps showing the division of property ownership.

4 Q. Do you remember what the first contact
5 was that anybody in the government made with
6 Penn Central to let them know that there was a
7 problem with this property?

8 A. No, I don't.

9 They were probably sent a notice
10 letter, I mean an information request in 1982.
11 But, I would have to check the files for that.

12 O. As far as you can remember today, a 104
13 E request might have been the first notice that
14 Penn Central had of potential problems on the
15 property?

16 A. Possibly, but I really don't know.

17 MR. TENENBAUM: Wait a second. First
18 notice?

19 MR. MADONIA: Notice from the government.

20 MR. TENENBAUM: From EPA?

21 MR. MADONIA: Right.

22 A. I really don't know.

23 Q. That is my question. As far as you
24 know.

1 A. Right.

2 Q. This is the first?

3 A. It may have been the first.

4 Q. Okay.

5 Are you aware of any other
6 communications between the government and Penn
7 Central in the nature of telling Penn Central
8 that there was a problem on the property after
9 the 104 E request?

10 A. Actually I would have to look at the
11 files to see whether we sent you a 104 E
12 request. I'm pretty sure we did.

13 Q. Well, after 1982, let me put it that
14 way.

15 A. Well, there were -- I know Penn Central
16 was participating in the settlement negotiations
17 which led to the partial consent decree signed
18 in June in 1985. And I know there were
19 negotiations even in 1984.

20 Q. Do you know whether the government
21 asked Penn Central to participate in those?

22 A. No, I don't.

23 Q. So, is it accurate for me to say that
24 other than a possible 104 E request, you don't

1 know of any specific communications from the
2 government notifying Penn Central that the
3 government wanted something done to the
4 property?

5 A. Well, there was the notice letter we
6 sent May 9, 1989.

7 Q. May of 1989?

8 A. Yes. May 9, 1989.

9 Q. What was that a notice of?

10 A. Of completion of the remedial
11 investigation feasibility study and initiation
12 of negotiations for implementation of the final
13 remedial actions at the site.

14 Q. Do you recall specifically what the
15 title search revealed about what you term as
16 Penn Central's ownership of the Midco II
17 property?

18 A. Just determined that Penn Central was
19 an owner or was the owner of a portion of Midco
20 II.

21 Q. Penn Central is kind of a slang term
22 that generally refers to a company. Do you
23 remember specifically who they said the owner
24 was in that document?

1 A. I would have to look at the document.
2 You mean whether it was Penn Central
3 Corporation?

4 O. Whatever the specific name was.

5 A. I would have to look in the document.

6 O. Do you have it here that you can refer
7 to today?

8 A. Do we have that document?

9 We have it. I understand that this is
10 it.

11 O. Could you refer to that document, then,
12 and look for the part that refers to the owners
13 of the property.

14 A. Okay.

15 I'm not an attorney so these terms
16 aren't familiar to me.

17 MR. BERMAN: Maybe we should take a break
18 for a minute because they are a few documents to
19 look through.

20 MR. MADONIA: Okay.

21 (Whereupon a short recess was had.)

22 O. Mr. Boice, have you had a chance to
23 review your documents relating to property
24 ownership of the Midco II site?

1 A. I have reviewed them briefly.

2 Again, I'm not an attorney so it is
3 difficult for me to interpret what they are all
4 about.

5 Q. Did you find anything during your
6 review that you think has something to do with
7 Penn Central?

8 A. There is a document here regarding
9 Pittsburgh, Ft. Wayne and Chicago Railway
10 Company.

11 Q. What does it say about that company?

12 A. I don't know, they are just on the
13 record, the document.

14 I'm not an attorney, and I don't know
15 how to interpret these documents.

16 Q. Is that company what you refer to as
17 Penn Central?

18 A. I am just presuming that it is
19 connected with Penn Central.

20 Q. Have you found any other documents in
21 your review that you believe have something to
22 do with Penn Central?

23 A. Well, I looked at the administrative
24 record. The liability index for Midco II in the

1 unilateral administrative order. And it
2 includes some type of letter, correspondence
3 with Michael McCluggage regarding Penn Central,
4 dated April 15, 1983. M-c-C-l-u-g-g-h-e-e.

5 Q. And who is Mr. McCluggage?

6 A. I believe he was a -- formerly at least
7 the attorney for Penn Central.

8 Q. What does that letter say?

9 A. I don't know. I haven't read it.

10 Q. Are you saying, then, that that letter
11 is an example of some communication between the
12 Agency and Penn Central or between Penn Central
13 and the Agency?

14 A. Well, it is listed on the list of
15 liability documents for Midco II. So if it is
16 listed there, it has to do with documenting the
17 liability of the parties to whom the unilateral
18 order was sent.

19 Q. Okay.

20 But that doesn't have anything -- you
21 haven't read it, so you don't know what it is,
22 do you?

23 A. No, except for it is right here.

24 Q. During your review that you just

1 conducted, did you see any document relating to
2 the title search that mentions Penn Central in
3 any way, other than the document that you
4 already described to us?

5 A. I would have to spend a long time
6 reading this over to find -- to be able to
7 answer that with any confidence.

8 Q. Okay.

9 Mr. Boice, did you ever personally
10 communicate with Penn Central for the purpose of
11 informing them that waste was being disposed of
12 on their property?

13 A. No.

14 Q. Did you ever personally request Penn
15 Central to do anything to keep people from
16 disposing of waste on its property?

17 A. Will you repeat the question?

18 Q. Did you ever request Penn Central to do
19 anything to keep people from disposing of waste
20 on its property?

21 A. Did I personally?

22 Q. Yes.

23 A. No.

24 Q. Did you ever request Penn Central to do

1 anything at the Midco II site?

2 A. Did I personally request them to do
3 anything?

4 Q. Right.

5 A. I guess you could say indirectly, in
6 that Penn Central was a party to the partial
7 consent decree signed in 1985.

8 And we made a request for revisions to
9 the work plans and comments on the feasibility
10 study that were prepared for the partial consent
11 decree.

12 Q. So that whole area of communication,
13 then, would have been the first interaction that
14 you had with Penn Central indirectly to request
15 them to do something at Midco II?

16 A. Me personally you mean?

17 Q. Right, or indirectly. You said that
18 that involved you.

19 A. Yes. That would have been the first
20 input I would have had.

21 Q. Do you know what measures Penn Central
22 took to keep people from disposing of waste on
23 its property?

24 A. No. Although I think I read something

1 about it.

2 Q. What?

3 A. That they didn't -- basically had no
4 knowledge of what was going on at the site.

5 Q. No.

6 I mean what did you read?

7 A. I don't remember.

8 Q. Okay.

9 But whatever it was, that document
10 stated that Penn Central had no knowledge of
11 what was going on on the Midco II property?

12 A. Well, I think the document is what Penn
13 Central's response -- a response of Penn Central
14 to us stated that they didn't have that, any
15 knowledge of what was going on at the site.

16 Q. So you do know what the document was?

17 A. Well, I know it was from Penn Central.

18 Q. Okay.

19 Other than that particular document, do
20 you know whether Penn Central had the ability to
21 control others who were dumping on its property?

22 A. No, I don't know whether they did or
23 not.

24 Q. Do you know whether it was even

1 possible for Penn Central to have stopped people
2 from dumping waste at the Midco II site?

3 A. What do you mean by possible?

4 Q. What could they have done?

5 Do you know of specific things that
6 could have been done?

7 A. I'm not an attorney, but I presume
8 since they operated, they owned the property,
9 that they could have sent someone out there to
10 hold the property.

11 Q. First let me clarify. I am not asking
12 for speculation.

13 I am asking if you know of anything
14 specifically that could have been done based on
15 your review of everything that happened at Midco
16 II that wasn't done by Penn Central.

17 MR. TENENBAUM: Object.

18 A. I don't think -- I mean that is a
19 confusing question. Because, I know in general
20 a property owner can do certain things to
21 protect his property.

22 BY MR. MADONIA:

23 Q. Right.

24 But what I am asking you is assuming

1 there are general things that some land owners
2 can do, you don't know yourself whether any one
3 of those specific items was, in fact, possible
4 for Penn Central to perform, do you?

5 MR. TENENBAUM: Objection.

6 A. Well, I'm not an attorney and I can't
7 tell what Penn Central possibly could have done
8 legally about it.

9 But, I presume they could have legally
10 done quite a few things about what was done on
11 the property.

12 BY MR. MADONIA:

13 O. I am not asking for legal things.

14 For example, they could have dug a 30
15 foot mote around the site and put alligators in
16 it. That is not a legal step. That is a
17 physical step.

18 You yourself, though, do not know which
19 physical steps were impossible for Penn Central
20 to take at the site, do you?

21 A. Well, I am sure it would have been
22 possible to put a fence across the site and tell
23 the Midco people not to place their wastes on
24 it.

1 Q. But is it possible that for some reason
2 or another that you are not aware of that
3 couldn't have happened?

4 A. I don't know.

5 MR. TENENBAUM: Objection.

6 BY MR. MADONIA:

7 Q. Let me ask you this.

8 Do you know for a fact that Penn
9 Central did not try to do that, could they have
10 tried to do that and you just didn't know about
11 it?

12 A. I don't know.

13 Q. You don't know what?

14 A. I don't know whether they could have
15 done it and not succeeded in doing it or not.

16 Q. Okay.

17 So if they did try to do it, you don't
18 know about it, do you?

19 A. That is true.

20 MR. MADONIA: We may have some questions
21 later on involving cost documents after counsel
22 for the other defendants finish their
23 cost-related questions, to the extent we believe
24 something needs to be covered that they haven't

1 already covered.

2 I would like to reserve the right to go
3 into those areas. But other than that, I
4 believe that is all we have right now.

5 MR. BLANTON: I am a third-party defendant.
6 You haven't answered my interrogatories yet. I
7 don't think it would be fruitful to proceed out
8 of order. I will wait until the defendants are
9 done.

10 MR. TENENBAUM: Off the record for a second,
11 please.

12 (Discussion had off the record.)

13 DIRECT EXAMINATION

14 BY MR. FINCH:

15 O. Mr. Boice, my name is David Finch. I
16 am one of the attorneys for Standard T Chemical
17 Company.

18 For the record, this is a continuation
19 of Standard T's deposition of Mr. Boice
20 conducted pursuant, we believe, to two notices
21 of deposition served on the United States on
22 November 26, 1989 originally, first noticing Mr.
23 Boice by name, and the second seeking a
24 deposition of a custodian of certain documents

1 set forth within the notice.

2 The questions I intend to ask are
3 pursuant to those notices of deposition. And
4 not pursuant to notices issued by other parties
5 in this case.

6 MR. TENENBAUM: Can we go off the record for
7 a second.

8 (Discussion had off the record.)

9 Back on the record.

10 BY MR. FINCH:

11 Q. Mr. Boice, I believe you testified on
12 the first day of this deposition that you became
13 RPM for the Midco site in 1985; is that correct?

14 A. That's correct.

15 Q. What was your government title at the
16 time?

17 A. My position and title is -- under the
18 civil service system is environmental engineer.

19 Q. Were you an environmental engineer
20 under the civil service system in 1985?

21 A. Yes.

22 Q. Are you still an environmental engineer
23 under that system?

24 A. Yes.

1 Q. Were you employed by USEPA immediately
2 prior to becoming RPM for the Midco site?

3 A. What do you mean by immediately prior?

4 Q. Do you recall the date that you became
5 RPM for the Midco site?

6 A. It was -- I believe it was in February
7 1985.

8 Q. A day in the month of February 1985?

9 A. I don't think it was that exact a
10 cut-off. It was a transition period.

11 Q. There was a period of time in which
12 another individual was also acting as RPM for
13 the site?

14 A. Yes.

15 Q. Do you recall who that individual was?

16 A. The previous RPM was Karen Waldvogel.

17 Q. Could you spell the last name, please?

18 A. W-a-d-v-o-g-e-l.

19 Q. W-a-d?

20 A. W-a, sorry. W-a-l-d-v-o-g-e-l.

21 Q. Waldvogel?

22 A. Waldvogel.

23 Q. There was a period of time during which
24 both you and Ms. Waldvogel were each acting as

1 RPM for the Midco site?

2 A. There was a transition period.

3 Q. Do you recall when that transition
4 period began?

5 A. Around January or February 1985.

6 Q. Do you recall when that transition
7 period ended?

8 A. Around January or February 1985.

9 Q. Were you employed by USEPA immediately
10 prior to the beginning of that transition
11 period?

12 A. Yes.

13 Q. What was your title with USEPA
14 immediately prior to the beginning of this
15 transition period?

16 A. Environmental engineer.

17 Q. How long had you been an environmental
18 engineer with the EPA?

19 A. I have been with EPA since November
20 1983 -- 1973.

21 Q. Had you been an environmental engineer
22 with EPA since November 1973?

23 A. No. I started out as a chemical
24 engineer, designated as a chemical engineer.

1 Q. When did you become an environmental
2 engineer?

3 A. While I was --

4 In '85 I got a job that was designated
5 a sanitary engineer, I mean '75. Sorry, not
6 '85.

7 '73 I started as a chemical engineer.
8 Then I became a sanitary or I was designated
9 sanitary engineer in '75. And went back -- in
10 about '77 I went back and then I was -- I think
11 I was, I don't remember whether I went back to
12 being an environmental engineer or a chemical
13 engineer.

14 I think I became a chemical engineer
15 again and then later the designation was changed
16 to environmental engineer.

17 Q. You say the designation was changed.

18 Do you mean that you held the same
19 position but the words to describe it changed,
20 or do you mean that you held a position with
21 different responsibilities and duties?

22 A. This was the same position. They just
23 changed position description.

24 Q. Had you ever acted as an RPM for any

1 Superfund sites prior to becoming the RPM for
2 the Midco site?

3 A. Yes.

4 Q. Do you recall the first such site you
5 had been designated the RPM?

6 A. The first site included the Ninth
7 Avenue dump site in Gary, Indiana. That was
8 when I started with the Superfund in March 1983.

9 Q. March '83?

10 A. Yes.

11 Q. What was the next site after that?

12 A. There were other sites.

13 RPM for the Burlington Northern site in
14 Minnesota, fairly shortly after I became -- I
15 became an RPM.

16 Q. Shortly after you became an RPM?

17 A. Yes.

18 Q. That was March of 1983?

19 A. Yes. Actually it was called an OSC at
20 this time. On-scene coordinator.

21 Q. OSC?

22 A. On-scene coordinator. Later they
23 changed the title to remedial project manager.

24 Q. Do you recall when the Agency changed

1 the title to remedial project manager?

2 A. I think it was around 1985.

3 Q. Before or after you became RPM at the
4 Midco site?

5 A. Before.

6 Q. Had you acted as RPM or OSC for any
7 sites other than the Burlington Northern site in
8 Minnesota and the Ninth Avenue site in Gary,
9 Indiana prior to becoming an RPM at Midco?

10 A. Yes.

11 I was RPM for -- during part of the
12 remedial investigation feasibility study at the
13 Crab Orchard Lake site.

14 Q. Crab Orchard Lake?

15 A. In Marion, Illinois.

16 Q. When did you become RPM at that site?

17 A. I believe it was during the spring of
18 1987.

19 Q. That was roughly a little more than two
20 years after becoming RPM at the Midco sites?

21 A. I think so. Yes.

22 Q. Okay.

23 A. Then there was -- I was RPM for the
24 Wauconda Sand & Gravel site.

1 Q. When was that?

2 A. That was from about the spring of 1985
3 until the fall of 1988.

4 Q. So I understand you, is it fair to say
5 that before becoming RPM at the Midco sites, you
6 had served as an OSC or an RPM only at two other
7 sites, Ninth Avenue and Burlington Northern?

8 A. No, that is incorrect.

9 Q. Okay.

10 What other sites?

11 A. I just told you.

12 Q. You were mentioning dates following the
13 time that you have testified you were first
14 named RPM at the Midco sites.

15 A. Okay.

16 There was -- I think I became RPM for
17 the Wauconda Sand & Gravel site before --
18 slightly before I became RPM for Midco.

19 That would have been I think around
20 December of 1984.

21 Q. Could you describe what your duties as
22 an environmental engineer with USEPA presently
23 are?

24 A. Well, the duties of a remedial project

1 manager are explained in the National
2 Contingency Plan.

3 Q. Do you serve any functions as a
4 government employee other than being an RPM?

5 A. Well, I am full-time in the position I
6 am presently in.

7 Q. What position is that?

8 A. Remedial project manager.

9 Q. So let me ask you again.

10 Do you serve any functions as a
11 government employee other than an RPM?

12 A. I don't know what you mean by
13 functions.

14 Q. Do you have any duties or
15 responsibilities as a government employee other
16 than those duties and responsibilities that
17 attach to your status as a remedial project
18 manager?

19 A. I don't think so. No.

20 Well, sometimes I fill in for my
21 supervisor as a -- doing supervisory functions.

22 Q. Are you responsible for filling out any
23 forms indicating the amount of time you devote
24 to any projects as to which you have

1 responsibilities as a government employee?

2 A. Yes.

3 Q. Is it only one form you fill out, or is
4 there more than one form that you fill out?

5 A. We fill out a timesheet every two
6 weeks.

7 Q. Is that what it is called, a timesheet?

8 A. Yes.

9 Q. Are you required in that timesheet to
10 account for all of your working activities or
11 only those activities that relate to specific
12 projects?

13 A. The timesheets, we can give you a copy
14 of it, includes categories for each site and a
15 different account number for each site. Then
16 there is a general account number.

17 Q. What does the general account number
18 allude to?

19 A. That includes all non-site-specific
20 work.

21 Q. Have you ever performed any
22 non-site-specific work since first becoming an
23 RPM?

24 A. Yes, every week.

1 Q. What sort of work is that?

2 A. It includes, for example, like I stated
3 before, filling in for my supervisor. Reading
4 guidance documents and so forth that aren't
5 specifically related to a review for a specific
6 site. Training, annual leave, sick leave.

7 And any other work that is not
8 site-specific such as filling out forms or --
9 for headquarters to evaluate different projects,
10 things like that. Even filling out the
11 timesheet would be non-site-specific.

12 Q. What were your duties as an
13 environmental engineer immediately prior to the
14 first time you became an RPM or an OSC?

15 A. I was in the central district office of
16 the United States EPA Region V, at 536 South
17 Clark.

18 That office conducts combination of air
19 sampling -- at that time, conducted a
20 combination of air surveillance, water
21 surveillance, and even hazardous waste
22 surveillance work.

23 Q. And what were your functions in
24 connection with this work?

1 A. I was -- I led surveys on or conducted
2 surveys for air emissions, for instance, visible
3 emission evaluations.

4 I would go to coke ovens or industrial
5 plants and read the smoke, based on the way we
6 are trained to evaluate the smoke emissions.

7 Sometimes we audited ambient air
8 monitors. We audited stack testing procedures.

9 We went to industrial plants or sewage
10 treatment plants and collected water samples
11 from the discharge and collected information on
12 the plant.

13 Also during that time that office was
14 also conducting hazardous waste investigations,
15 so -- and RCRA inspections, too, inspections for
16 compliance with RCRA.

17 Q. Did you have a job title in connection
18 with these functions other than environmental
19 engineer?

20 A. No.

21 Q. At some point prior to March 1983 you
22 ceased doing these functions, isn't that
23 correct, and then began to carry on the
24 functions of an OSC or RPM?

1 A. In March 1983, I got a new job in the
2 Superfund program as a remedial project manager.

3 Q. How did it come about that you got the
4 new job in the Superfund program?

5 A. I went through the normal procedures.
6 The position was announced, I filled out the
7 applications, the necessary applications for the
8 position, and submitted them. The supervisors
9 for the positions that were open conducted an
10 interview and I was hired.

11 Q. When was the position announced?

12 A. I don't know. It would have been
13 before March 1983.

14 Q. How much before?

15 A. I don't know.

16 Q. Can you make a reasonable estimate of
17 the time prior to March 1983 the position was
18 announced?

19 A. Probably in January.

20 Q. Of 1983?

21 A. Yes.

22 Q. So, it is your estimate that it was
23 roughly a two-month hiatus between the time that
24 the position was announced and the time that you

1 filled it?

2 A. I think that is reasonable.

3 Q. And how was the position announced?

4 A. The standard way positions are
5 announced in EPA. There is an announcement,
6 with an announcement number. It includes
7 information on the office where the position is
8 open, and a description of the position.

9 A description of the basic minimum
10 qualifications to qualify for the position. And
11 a description of the ranking patterns that will
12 be used to evaluate the applicants.

13 Q. This was posted?

14 A. Yes.

15 Q. That's how you saw the announcement,
16 that it was posted?

17 A. Yes.

18 Q. And you chose to respond to that, is
19 that correct?

20 A. That's correct.

21 Q. And there was an application process
22 that the Agency followed?

23 A. That's correct.

24 Q. And you followed that application

1 process?

2 A. Yes.

3 Q. What did that process consist of?

4 A. I just told you what it consists of.

5 Q. You may not have done so. Let me
6 rephrase the question.

7 Were there any interviews that were
8 conducted?

9 A. I just told you there was an interview
10 conducted.

11 Q. There was one that you attended?

12 A. I was interviewed for the position,
13 yes.

14 Q. Who interviewed you?

15 A. Russell Deifenbach.

16 Q. What was his position?

17 A. Unit chief.

18 Q. Unit chief of what?

19 A. He was chief of one of the two units in
20 the Superfund immediate response program at that
21 time.

22 Q. Was he the only individual who
23 interviewed you?

24 A. No. I was also interviewed by Craig

1 VanDerlaan.

2 Q. What was his position?

3 A. He was unit chief of the other unit in
4 the remedial response section.

5 Q. Were you interviewed by anyone else?

6 A. Not for that position, no.

7 Q. Did you have to provide any information
8 other than information that you may have
9 submitted by way of a job application to the
10 Agency?

11 A. No.

12 Everything that is required was
13 outlined in the job announcement. It includes,
14 let's see, the 171 form, the most recent --

15 Q. What is the 171 form?

16 A. It is job application material,
17 including your name, work history, education
18 information, references. And then it also
19 requires submission of the most recent
20 performance appraisal.

21 Q. Did you submit that appraisal or was it
22 submitted by someone else at your request?

23 A. I think I told you I submitted
24 everything required under the job announcement.

1 Q. It wasn't clear to me whether you
2 caused it to be submitted or whether you
3 personally submitted it.

4 A. I submitted it personally.

5 Q. Do you recall when your interviews with
6 Messrs. Deifenbach and Mr. VanDerlaan took
7 place?

8 A. Well, I was hired in March 1983. So I
9 presume it was in March 1983, or maybe February
10 1983.

11 Q. When were you informed that you were
12 accepted into the position of regional or
13 remedial project manager?

14 A. March 1983.

15 Q. Was there any training that you were
16 required to go through before assuming those
17 responsibilities?

18 A. No. We were required to take training
19 after we became RPM's.

20 Q. Were there any materials you were
21 required to review before becoming an RPM?

22 A. No.

23 We got on-the-job training and also
24 other required training following starting to

1 work in that position.

2 Q. Were there any tasks you were required
3 to undertake other than ministerial tasks
4 relating to the transfer to a new position
5 within a government agency prior to becoming an
6 RPM?

7 Do you understand my question?

8 A. I don't know what you mean.

9 Q. All right.

10 When people transfer jobs, there is a
11 certain amount of paperwork and red tape that
12 has to be cleared normally in most large
13 organizations.

14 Do you agree with that, do you
15 understand my point?

16 A. Yes.

17 Q. Other than that stuff, were there any
18 tasks that you were required to complete prior
19 to assuming responsibility as an RPM?

20 A. I don't know what you are talking
21 about.

22 Q. Were you required to review any agency
23 guidance or any regulations issued or followed
24 by the Agency regarding the Superfund program

1 prior to becoming an RPM?

2 A. No.

3 The requirements were to complete the
4 171 form and to submit a performance evaluation.

5 Based on that, they decided I was
6 qualified and one of the desirable applicants
7 for the job.

8 Q. And they informed you of that fact,
9 right?

10 A. Yes. I was informed that I was hired,
11 right.

12 Q. Okay.

13 How long after you received that
14 information did you begin to work as an RPM?

15 A. The information that I was hired you
16 mean?

17 Q. Yes.

18 A. I think it was a couple weeks.

19 Q. What did you do during that two-week
20 interim?

21 A. Back in 1983 you mean?

22 Q. Yes.

23 A. I don't remember.

24 Q. Prior to becoming an RPM, did you

1 review any Agency guidance or regulations
2 regarding the Superfund program?

3 A. I don't remember.

4 Q. Prior to becoming an RPM, did you
5 review any materials of any nature whatsoever
6 regarding the Superfund program?

7 A. Well, I reviewed the job announcement.
8 I know that.

9 Q. The job announcement was a one-page
10 document; is that correct?

11 A. I think it is usually two pages.

12 Q. Two-page document.

13 Did you review any other document
14 regarding the Superfund program before becoming
15 an RPM?

16 A. Well, I already had a lot of safety
17 training, so if you are talking about -- I don't
18 know what you are referring to.

19 But, I had a lot of training in
20 conducting hazardous waste inspections and
21 conducting RCRA inspections, and other types of
22 Agency inspections. But, I really don't know
23 what you are referring to.

24 Q. You testified that you would undergo

1 on-the-job training as an RPM; is that right?

2 A. That's right.

3 But, you get other types of training
4 outside the Agency or from Agency training
5 systems.

6 Q. When did you learn that you would be
7 undergoing on-the-job training?

8 A. I think that is kind of assumed, isn't
9 it?

10 Q. You assumed it?

11 A. I think that is generally assumed that
12 if you go to a new job, you are going to get
13 some type of on-the-job training.

14 Q. That is really not my question.

15 Did you form an assumption about the
16 nature of training that you would receive, if
17 any, at the time that you took the RPM position
18 in March of 1983?

19 A. I don't know what you are talking
20 about.

21 MR. TENENBAUM: I don't see how his
22 assumption about what kind of training, getting
23 some on-the-job training, as well as some other
24 training, is a relevant issue in this case.

1 BY MR. FINCH:

2 Q. Did you ever receive on-the-job
3 training?

4 A. Yes.

5 Q. When?

6 A. I think we are always getting
7 on-the-job training. As we work, we learn, and
8 we ask other people what they have done.

9 Q. Is that the only source of on-the-job
10 training that you received as an RPM?

11 MR. TENENBAUM: What do you mean by
12 on-the-job training?

13 MR. FINCH: It is not my term, counsel. It
14 is your witness' term.

15 Q. You have used the term on-the-job
16 training, Mr. Boice. What do you mean by that?

17 A. Well, when I first started, I was
18 assigned one person to act as sort of a mentor
19 to ask questions to.

20 Q. Sort of a mentor?

21 A. Yes.

22 And, of course, I asked him questions
23 and then I asked -- didn't just ask him
24 questions. I asked other people questions, too.

1 Q. Who was your mentor?

2 A. Jim Pankinan was my first mentor.

3 P-a-n-k-i-n-a-n, I think.

4 Q. Pankinan. What was his position?

5 A. He was a remedial project manager.

6 Q. Do you know whether as your sort of a
7 mentor Mr. Pankinan was responsible for training
8 you as to specific tasks or responsibilities
9 that you were to assume as an RPM?

10 A. No, it was more informal. As I had
11 problems, I was to discuss it with him and other
12 people.

13 Q. Was Karen Waldvogel responsible for
14 providing you any on-the-job training?

15 A. Yes.

16 Q. What on-the-job training was she
17 responsible for providing you?

18 A. Providing me information on the Midco I
19 and II sites.

20 Q. Was she responsible for advising you as
21 to what you were supposed to do with this
22 information?

23 A. No. We were basically in the same
24 position, so she could always give me advice.

1 But, she had never, no special responsibility
2 for giving me advice.

3 Q. Were you ever supplied a copy of a job
4 description for a remedial project manager?

5 A. Yes.

6 Q. When did you receive that job
7 description?

8 A. I believe it was probably shortly after
9 I started working.

10 Q. Who gave it to you?

11 A. I presume my supervisor did.

12 Q. Why did you say you presume?

13 A. Because I don't remember.

14 Q. Would this be a formal Agency document?

15 A. Yes.

16 Q. Do you recall reviewing the document?

17 A. I don't remember reviewing it. No.

18 Q. Do you know whether the job description
19 for an RPM has changed since you first became an
20 RPM in 1983?

21 A. In 1983 they called it on-scene
22 coordinator.

23 Q. Okay.

24 Job description for an on-scene

1 coordinator.

2 A. I think it has changed.

3 Q. Why do you think it's changed?

4 A. Well, it is partly reflected in the
5 name.

6 Q. The name has changed.

7 Have any of the substantive duties
8 changed?

9 A. At that time it was thought of being
10 more on-site work, I guess, when we started.
11 Now it seemed more managing the studies, that we
12 are not actually on the site that much.

13 Q. Why do you say it seemed more as
14 managing the studies?

15 A. I don't understand your question.

16 Q. You testified a moment ago, unless I
17 misheard you, that the responsibilities of an
18 on-scene coordinator now known as a remedial
19 project manager have changed. Is that correct,
20 since --

21 A. I presume they have changed. Yes.

22 Q. You presume they have changed?

23 A. Yes.

24 Q. And you think they have changed a way

1 from just on-site work towards something
2 broader; is that correct?

3 A. I wouldn't say broader.

4 Q. Something different?

5 A. Something different.

6 Q. How is it different?

7 A. I'm not a specialist in these position
8 descriptions. I'm not that familiar with them.

9 Q. So you don't know how it's changed?

10 A. I wouldn't be able to testify.

11 I could go back and look it up, if you
12 are interested.

13 Q. Mr. Boice, do you have a perception as
14 to whether your job duties and responsibilities
15 have changed since you first became an on-scene
16 coordinator in 1983?

17 A. Yes. They have changed somewhat.

18 Q. And how have they changed?

19 A. I just told you.

20 Q. You just said you couldn't testify as
21 to the change because you are not a specialist
22 in job descriptions.

23 So I want to know how has your
24 perception of the change in your job

1 responsibilities changed since you first became
2 an on-scene coordinator?

3 A. Well, I think I already told you that
4 now the remedial project manager, the type of
5 work we do in the remedial project, there is not
6 as much direct on-site work.

7 It is more managing studies and
8 reviewing studies. Working WPRP's and
9 consultants, and even reviewing cost documents
10 and like what we are doing today, depositions.

11 Q. What do you mean by managing studies?

12 A. If the Agency does a study, then we --
13 well, I could talk about that for an hour, if
14 you want to.

15 The general responsibilities of a
16 remedial project manager is contained in the
17 National Contingency Plan.

18 Q. That's what you mean by managing
19 studies?

20 A. Yes.

21 Q. Was there a National Contingency Plan
22 in March of 1983?

23 A. I don't remember.

24 Q. Is it your testimony that on-scene

1 coordinators were not responsible for managing
2 studies in March of 1983?

3 A. I didn't say that.

4 Q. Is it your testimony that the degree of
5 responsibility held by an on-scene coordinator
6 for managing studies has increased since 1983?

7 A. I didn't say that.

8 Q. Has there been any change in the degree
9 or nature of your responsibilities in managing
10 studies since you became an on-scene
11 coordinator in 1983?

12 A. I would say it has about the same.

13 Q. So there has been no change then?

14 A. Basically no change in what I have been
15 doing, but the position description, the Agency
16 has realized that it is a different type of
17 position than they first foresaw in 1983.

18 Q. The Agency has realized it is a
19 different sort of position?

20 A. Correct.

21 Q. And is it your testimony that the
22 Agency -- that there is more involvement now in
23 managing studies and in reviewing studies and
24 working with PRP's and going over cost documents

1 and appearing and depositions and the like, do I
2 understand that correctly?

3 A. I don't understand what you are asking.

4 Q. We will go over it again.

5 Have there been changes in the nature
6 of the responsibility of employees holding the
7 position of on-scene coordinator or remedial
8 project manager since you first became an
9 on-scene coordinator in 1983?

10 A. Isn't that what we have been going over
11 for the last half hour?

12 Q. I had thought that that was exactly
13 what we had been going over.

14 A. Yes. You keep changing the response.

15 Q. I certainly don't intend to do that.

16 How has your responsibility regarding
17 managing studies changed since 1983?

18 MR. TENENBAUM: Asked and answered.

19 A. Basically the same.

20 BY MR. FINCH:

21 Q. So you are saying there hasn't been a
22 change?

23 A. No.

24 I said -- before you were asking about

1 the change in the position description. I told
2 you about the change in the position
3 description.

4 You are asking me about the actual work
5 done is basically the same.

6 Q. So you assume positions, your
7 responsibilities have not changed, is that your
8 testimony?

9 A. In general -- although in 1984 I was an
10 OSC at a removal site at Calumet Container that
11 took a couple months. So during that period of
12 time I actually was an OSC.

13 The rest of the time I was basically
14 doing the same type of work that an RPM does at
15 this time.

16 Q. So other than that one instance, your
17 duties and responsibilities have remained
18 essentially the same, the job description has
19 changed; is that your testimony?

20 A. It is my testimony that that is my
21 perception.

22 I don't know, I would have to go back
23 to the job description, research it, if you want
24 really an authoritative, final answer on that.

1 Q. Do you recall ever being instructed to
2 review the National Contingency Plan as a
3 requirement of your work as an RPM?

4 A. I think I just told you that I don't
5 know whether there was a National Contingency
6 Plan in 1983.

7 Q. How did you know what rules and
8 regulations would apply to your work as an RPM
9 in 1983?

10 A. Well, there was a law. First of all,
11 maybe there was a National Contingency Plan in
12 1983.

13 I just don't remember.

14 Q. If there was one, you didn't read it?

15 A. If there was one, I read it. And also
16 there was the law.

17 Q. Statute?

18 A. Yes. The statute. And various
19 guidance documents.

20 Q. Do you know that you were required to
21 read the law, the statute, and the guidance
22 documents as part of your responsibilities as an
23 RPM?

24 A. Well, I think it wasn't specifically

1 stated in my position description, but I have to
2 sit down and read the statutes and the National
3 Contingency Plan and the guidance documents.

4 But, those were provided to me and I
5 had to study them to do an adequate job.

6 Q. How do you know that?

7 A. If I didn't do an adequate job, I would
8 get a poor performance rating in my evaluation,
9 my yearly performance evaluation.

10 Q. So the only reason you had to study
11 these documents is because you thought if you
12 didn't, you wouldn't perform well?

13 A. No. It was understood that this was
14 expected.

15 Q. How do you know it was understood?

16 MR. BLANTON: Would you tell the rest of us
17 what relevance any of this line of inquiry has
18 to do with this lawsuit.

19 MR. FINCH: Are you raising an objection,
20 counsel?

21 MR. TENENBAUM: I will object to it if he
22 won't.

23 MR. BLANTON: All objections are reserved
24 except as to the form of the question. It is

1 pointless to assert objections.

2 I would just like to know why we are
3 going off. We have spent a long time going into
4 his background. I am curious as to whether it
5 is going somewhere that has to do with the
6 issues in the case.

7 MR. FINCH: I think the question goes to the
8 heart of several issues in this case, including
9 Mr. Boice's training, his background, his
10 ability to understand some of the questions that
11 were put before him on which he took action on
12 behalf of USEPA, his ability to understand --

13 A. I didn't take action on behalf of EPA.

14 MR. TENENBAUM: Wait until there is a
15 question.

16 MR. FINCH: His ability to understand the
17 positions taken by the defendants in this case,
18 and their agents, and by some of the experts who
19 worked on RIFS issues.

20 I am entitled to know the extent to
21 which Mr. Boice was familiar with government
22 policy documents that he has alluded to as
23 having guided his action.

24 MR. BLANTON: Okay. Thank you.

1 MR. TENENBAUM: I would object to this whole
2 line of questioning at this point as not being
3 relevant and as being quite a bit excessive on
4 day four of this deposition to take someone's
5 time on this.

6 MR. FINCH: Counsel, this is hour one of our
7 questions, other than the brief series of
8 questions that Mr. Sheldon asked by stipulation.

9 MR. TENENBAUM: I don't know why you say it
10 was brief. We have a transcript here, but I
11 think it probably consumed -- I can look, but it
12 wasn't brief.

13 MR. FINCH: Counsel, I am just going to
14 continue we will give you -- I will give you a
15 standing relevancy objection, if you wish, to
16 any question I ask.

17 But, I am going to continue until you
18 cut me off.

19 Could you read the last question and
20 answer, Mr. Reporter.

21 (The record was read.)

22 Q. How do you know it was understood?

23 A. Okay.

24 Well, I think my supervisor gave me a

1 copy of the law. He told me I should read it.
2 And then there are various guidance documents
3 distributed at various times and we are
4 requested to read those documents.

5 Q. When did you become the sole RPM for
6 the Midco sites?

7 A. I had already answered that question.

8 Q. Was it in March of 1985; is that right?

9 A. February or March.

10 Q. Is it your testimony that the
11 transition period lasted about a month or so?

12 A. Something like that.

13 Q. Who was your immediate supervisor when
14 you became sole RPM for the Midco site?

15 A. Russell Deifenbach.

16 Q. Is he still your immediate supervisor?

17 A. No.

18 Q. Who is your immediate supervisor?

19 A. Melinda Gould.

20 Q. When did she become your immediate
21 supervisor?

22 A. Let's see, I think it was sometime in
23 1988.

24 Q. Has she ever asked you to review any

1 Agency guidance documents or regulations?

2 A. Yes.

3 O. Has she ever endeavored to know the
4 extent to which you understood those documents
5 or regulations?

6 A. You mean has she ever given me a test,
7 a written test?

8 Q. Has she ever had any communication with
9 you for the purpose of determining the extent to
10 which you understood those documents?

11 A. I have never had a written examination
12 if that is what you mean.

13 Q. Have she ever had a discussion with you
14 about those documents?

15 A. Yes.

16 Q. Is there any procedure in place within
17 the Agency designed to so far as you know make
18 sure that RPM's understand Agency regulations
19 and guidance?

20 A. Yes.

21 Q. What is that procedure?

22 A. There is an RPM training institute, I
23 don't know all the requirements. But, it
24 includes I think the first year they get a

1 couple weeks of training, and then -- at least I
2 think it is a whole month the first year. Then
3 there is a couple weeks every year after that.

4 But, in the first year there is -- I
5 think there is a whole month or at least two
6 weeks and in something called the RPM training
7 institute.

8 Q. Is the RPM training institute part of
9 USEPA?

10 A. Yes.

11 Q. Does it have a physical location?

12 A. I don't think so, program.

13 Q. Is it mandatory for RPM's?

14 A. It is mandatory for all new RPM's.

15 Q. When did it become mandatory for all
16 new RPM's?

17 A. I believe it was about a year ago.

18 Q. When did the institute come into
19 existence?

20 A. I don't remember.

21 Q. Have you ever received any training
22 through the institute?

23 A. No.

24 Q. Have you ever received any formal

1 training at all on Agency guidance or
2 regulations affecting the Superfund program?

3 A. Yes.

4 Q. When?

5 A. Okay.

6 I got -- had a one-day refresher course
7 last month on safety training. We had a one-day
8 broad forum on how to write R.O.D.'s, how to
9 apply the new National Contingency Plan on
10 preparation of records of decision.

11 Q. That was all in one day?

12 A. That was one day.

13 Q. When?

14 A. That was about a month ago. And if we
15 go back, there was a seminar on solidification,
16 I think it was four days, that was in the fall
17 of 1989.

18 Q. Seminar on solidification?

19 A. Yes.

20 Q. In the fall of '89?

21 A. Yes.

22 Q. Where did that seminar take place?

23 A. Rosemont.

24 Q. Who conducted it?

1 A. It was EPA conducted.

2 Q. Who attended it?

3 A. It was for EPA and industrial, whoever
4 wanted to attend.

5 Q. You testified you were present for
6 that?

7 A. I was present for that.

8 Q. Did you have any role to play in
9 putting that seminar on?

10 A. No.

11 In March of 1979, there was --

12 MR. TENENBAUM: '79?

13 A. 1989. There was a Haz Mat conference
14 that I attended.

15 BY MR. FINCH:

16 Q. Pardon me?

17 A. Haz Mat, hazardous materials
18 conference. It was called Haz Mat, in Rosemont.
19 Rosemont, Illinois.

20 That included -- it included vendor
21 displays, as well as various conferences or
22 discussions of the law. I took a one-day
23 seminar in environmental law.

24 And then there were discussions of

1 different types of investigations and new
2 technologies, so forth.

3 Of course, in the interim, there were a
4 few meetings, one-day meetings and things like
5 that, on things like preparation of
6 administrative records.

7 Q. When was that?

8 A. What?

9 O. When was there a meeting on preparation
10 of administrative records?

11 A. I don't remember, but I have attended
12 one.

13 And then there were, I know there was a
14 one-day seminar on the new NCP, that was a few
15 years ago. And I have attended a couple
16 one-week seminars on R.O.D. preparation in
17 headquarters.

18 And I attended -- a few years ago I
19 attended the hazardous materials conference
20 sponsored by the hazardous materials, hazardous
21 waste control -- what is it, Hazardous Material
22 Control Research Institute in Washington, D. C.,
23 which included discussions of various
24 technologies, and about the new law and how

1 wastes have been handled on different sites.

2 Q. Is there a formal procedure by which
3 RPM's can obtain interpretations of Agency
4 guidance or regulations if they believe that
5 they need such interpretations?

6 MR. TENENBAUM: Objection.

7 A. There is always contacts with
8 headquarters that you can call regarding
9 interpretation of their regulations.

10 Besides people within the Region V,
11 which is our supervisors or someone else who
12 happens to have more detailed knowledge on
13 certain issues.

14 BY MR. FINCH:

15 Q. Are there procedures or requirements in
16 place under which you are required to obtain
17 such interpretation and are not permitted to
18 rely on your own reading of Agency guidance or
19 regulations in any specific instance?

20 MR. TENENBAUM: Object.

21 A. I don't know what the specific instance
22 you are referring to.

23 BY MR. FINCH:

24 Q. Are there any circumstances in which

1 you as an RPM are obligated to consult somebody
2 else before relying upon your reading of any
3 Agency guidance or regulation?

4 MR. TENENBAUM: Objection. Calls for a
5 legal conclusion.

6 A. Without knowing what specific issue you
7 are presenting, I don't know what -- but almost
8 everything that goes out is reviewed by somebody
9 besides me.

10 BY MR. FINCH:

11 Q. Almost any document that you prepare
12 you are saying?

13 A. Yes.

14 I can't think of a document that I
15 prepared other than transmitting information
16 that did not go out -- wasn't reviewed by
17 someone else.

18 Q. You have testified in this deposition,
19 Mr. Boice, about an instance in which you
20 believed that Environmental Resources Management
21 was acting in bad faith.

22 Do you recall that testimony?

23 A. Again, you are misinterpreting what I
24 said.

1 The question was basically what
2 impression I got from their performance. Did I
3 get an impression of bad faith. And I said yes,
4 it gave me that impression.

5 Q. So you did not conclude that there was
6 any conduct in bad faith?

7 A. That's correct.

8 Q. Do you recall --

9 A. And it wasn't ERM. It just gave me
10 that impression that there was some type of bad
11 faith.

12 Q. It was not ERM?

13 A. Or it is not necessarily ERM who was
14 behind it, that performance. We don't know.

15 Q. What performance are you alluding to?

16 A. I have already discussed that in a
17 previous -- in my deposition before. In fact, I
18 think it was yesterday morning.

19 Q. I don't recall you using the word
20 performance. I want to know what you mean by
21 performance?

22 A. I discussed that, I think I talked for
23 about five or ten minutes. It included a number
24 of different problems with ERM's performance,

1 that discussion.

2 Q. You were alluding to changes that USEPA
3 requested in a remedial investigation, isn't
4 that correct?

5 MR. TENENBAUM: Objection.

6 A. No, it is not just that. It was a
7 number of other items and I have already
8 responded to that question.

9 BY MR. FINCH:

10 Q. Do you recall attending a meeting with
11 representatives of various defendants and
12 third-party defendants on May 22, 1987?

13 A. I would have to look at my records. I
14 can't say for sure whether I attended a meeting
15 on May 22, 1987 or not.

16 Q. Would it refresh your recollection if I
17 were to suggest to you that during this meeting
18 there was a discussion of changes that USEPA
19 wished to require in the 19 April 1987 Midco I
20 remedial investigation report?

21 MR. TENENBAUM: Can we see the document?

22 A. I can't remember the date. I know
23 there was a meeting on that. Yes.

24 MR. FINCH: Okay.

1 MR. TENENBAUM: Is there a document that you
2 have?

3 MR. FINCH: I have a document, but I don't
4 wish to show it to the witness.

5 Q. Do you know who John Bassett is?

6 A. Yes.

7 Q. Forgive me if you have already
8 identified him in this deposition. Who is he?

9 A. He is a - I believe he was a
10 hydrogeologist. He worked for --

11 He worked at that time for Geosciences
12 Research Associates.

13 Q. Do you know someone by the name of John
14 Imse? I think that is how it is pronounced.
15 I-m-s-e.

16 A. Yes. He works for Environmental
17 Resources Management.

18 Q. Henry Ballenkoff?

19 A. I don't remember that name.

20 Q. Kirk Stempson you have identified.

21 Do you recall a meeting at which Mr.
22 Stempson was present, Mr. Imse was present, and
23 Mr. Bassett was present in a late May 1987?

24 MR. TENENBAUM: Can I have a continuing

1 objection to these questions on discovery into
2 record-review issues, or do you want me to
3 object to each one?

4 MR. FINCH: You have that.

5 I am not asking this for purposes
6 relating to the content of the record or the
7 manner in which the record has been used in this
8 lawsuit.

9 MR. TENENBAUM: Well --

10 MR. FINCH: I am asking these questions in
11 relation to the witness' assertion that he had
12 an impression of bad faith as a result of
13 certain conduct by unidentified individuals in
14 this lawsuit.

15 A. I don't think I said conduct.
16 Performance.

17 Q. Performance.

18 A. It wasn't related to conduct.

19 Q. It was related to performance; is that
20 right?

21 A. Correct.

22 Q. Okay.

23 I amend my statement. Because the
24 witness has made assertions of an impression of

1 bad faith in relation to the performance of
2 certain individuals. I take it that is not a
3 record-review issue.

4 MR. TENENBAUM: I don't know. Is that an
5 issue, one of the issues in the case?

6 MR. FINCH: Are you willing to stipulate
7 that it is not an issue in the case for purposes
8 of any of the relief sought by the US?

9 MR. TENENBAUM: I don't recall that we have
10 an allegation in our complaint that there was
11 bad faith in the RIFS. I don't recall that
12 being in there.

13 MR. FINCH: Can we go off the record for a
14 moment.

15 (Discussion had off the record.)

16 Back on the record, please.

17 I am just going to continue with this
18 line of questioning on the assumption that the
19 second amended complaint seeks relief which may
20 be related to certain assertions made by this
21 witness about impressions of bad faith that he
22 has in this lawsuit.

23 MR. TENENBAUM: Were you able to find
24 anywhere in the complaint where it said that?

1 MR. FINCH: I found a number of places or I
2 am aware of a number of places in the complaint
3 that may be read that way. I would invite the
4 government to stipulate that that reading is
5 incorrect.

6 MR. TENENBAUM: Which part of the complaint?

7 MR. FINCH: All right. Off the record for
8 just a moment.

9 (Discussion had off the record.)

10 Back on the record.

11 What was the last question and answer,
12 Mr. Reporter.

13 (The record was read.)

14 Q. Do you have any information, Mr. Boice,
15 that suggests to you that Standard T Chemical
16 Company was involved in the performance that
17 gave you an impression of bad faith or any
18 performance that gave you an impression of bad
19 faith?

20 A. Well, I know --

21 MR. TENENBAUM: Object.

22 A. I know Standard T was one of the
23 defendants, the participants in the consent
24 decree for the remedial investigation

1 feasibility study.

2 BY MR. FINCH:

3 Q. How does the fact that Standard T was a
4 participant in the consent decree suggest to you
5 that it was involved in a performance giving you
6 the impression of bad faith?

7 MR. TENENBAUM: Same objection or objection.

8 A. Standard T was one of the defendants,
9 the participants in the 1985 consent decree.

10 And apparently they hired or
11 designated, I guess, I was told they designated
12 Midco trustees to oversee the completion of the
13 RIFS.

14 But, I really don't know that much
15 about your internal arrangement.

16 BY MR. FINCH:

17 Q. Is it, therefore, equally your
18 impression that all participants, other than the
19 government in the 1985 partial consent decree,
20 were involved in the performance that gave you
21 the impression of bad faith?

22 A. I guess you could say you were
23 involved. Yes. I don't know exactly what you
24 mean by involved.

1 Q. What do you mean by involved?

2 A. Just what I said. You were a
3 participant in the 1985 consent decree.

4 Q. When did you first form this impression
5 of bad faith?

6 A. I have already told you.

7 Q. No, you didn't.

8 When did you first form the impression
9 of bad faith?

10 A. Yesterday I give a full -- not a full
11 description, but a general description of the
12 problems we had with the performance of the
13 RIFS.

14 Q. I am not asking you for a general
15 description of your problems with the RIFS. I
16 am asking you when you first formed the
17 impression of bad faith?

18 A. I think I have answered the question.

19 Q. You have not answered the question and
20 I am putting the question to you again.

21 When did you first form an impression
22 of bad faith?

23 MR. TENENBAUM: You can answer the question,
24 but I object.

1 Most likely this particular question
2 has been asked previously. You may answer
3 subject to my objection.

4 A. Probably after review of the second
5 draft of the remedial investigation.

6 BY MR. FINCH:

7 Q. Your review of that second draft?

8 A. USEPA's review.

9 O. Was it before or after -- let me
10 withdraw that.

11 Did you also review comments on that
12 second draft submitted to EPA by any contractor
13 or agent of EPA?

14 A. Yes.

15 Q. Who?

16 A. There were comments by Roy F. Weston.
17 PRC Engineering. Keros Cartwright. I think on
18 the second draft, though, maybe not Keros
19 Cartwright, just PRC and Roy F. Weston.

20 Q. Did their comments have any role to
21 play in the formation of your impression of bad
22 faith?

23 A. Yes.

24 Q. What role was that?

1 A. You can review the comments that are in
2 the administrative record, the R.O.D.
3 administrative record.

4 Q. Would the reporter repeat the question
5 to the witness, please.

6 (The record was read.)

7 Do you understand the question, Mr.
8 Boice?

9 A. No.

10 Q. Are you declining to answer the
11 question because you don't understand it?

12 A. I think if you read the comments that
13 they produced that are in the administrative
14 record, it will be fairly obvious.

15 Q. If I read those comments, I may react
16 entirely differently than you reacted when you
17 read them. And I want to know how those
18 comments caused you to react as you did.

19 Do you recall the pending question?

20 A. I didn't say I reacted, did I?

21 I just formed an impression, that is
22 not saying it was a reaction. That is not the
23 same as a reaction.

24 MR. TENENBAUM: Maybe the witness is going

1 to have to look at the documents.

2 MR. FINCH: Is that what the witness is
3 saying? What is the witness saying?

4 O. Do you want to look at the documents?

5 Do you not recall how the documents or
6 what role the documents played in the formation
7 of the impression of bad faith to which you have
8 testified?

9 A. Well, I already told you that the
10 second draft included eliminating data that
11 Geosciences had previously validated and used in
12 the remedial investigation. That was recorded
13 by Roy F. Weston. The document is in their
14 review.

15 Also they documented the change in risk
16 assessment assumptions from the draft by
17 Geosciences, from assuming on-site exposures,
18 certain on-site exposures, to not assuming those
19 type of exposures.

20 Q. Is it your testimony that comments by
21 Roy F. Weston and PRC --

22 A. And also on the ground water, their
23 review of the ground water model also showed
24 significant substantial problems, in your

1 assumptions made in the model.

2 Q. All right.

3 Is it your testimony that comments
4 given you by Roy F. Weston and PRC enabled you
5 to identify these items of change?

6 A. It aided me.

7 Q. It aided you.

8 Do you recall the form that the
9 comments from Roy F. Weston and PRC took?

10 A. There were written comments, plus
11 discussions over the telephone.

12 Q. Are the written comments part of the
13 administrative record to your knowledge?

14 A. Yes.

15 Q. How about any notes that you might have
16 taken from the discussions over the telephone,
17 are they part of the administrative record?

18 A. No.

19 Q. Was it your practice to take notes or
20 to prepare memoranda memorializing telephone
21 conversations with Agency contractors?

22 MR. TENENBAUM: Are you referring to these
23 specific -- this specific telephone
24 conversation?

1 MR. FINCH: Not yet.

2 I am just laying a foundation as to
3 what his normal practice was.

4 MR. TENENBAUM: Well, I am going to have to
5 object to the extent that you are asking the
6 witness' practice with respect to any record
7 issues.

8 But, you can answer as to this
9 particular phone call.

10 A. In general, I produced telephone memos
11 when I have time and it is important.

12 BY MR. FINCH:

13 Q. When you have time and when it is
14 important, or when you have time or when it is
15 important?

16 A. Both, and/or.

17 Q. And/or.

18 Were these telephone conversations
19 important?

20 A. Important in doing what?

21 Q. You used the word important, I didn't.
22 Were these telephone conversations
23 important?

24 A. No. Important, I was talking in

1 general. Now you are talking specific. You
2 mean important in doing what?

3 Q. Let's back up.

4 It is your testimony, correct me if I
5 am wrong, that it has been your practice as an
6 RPM to make notes or to prepare memoranda of
7 telephone conversations when first you have time
8 or when the conversations are, to use your word,
9 important; am I --

10 A. And/or. Sometimes I don't have time
11 even if it is fairly significant.

12 Q. Okay. You did use the words important
13 and fairly significant.

14 Would you describe your telephone
15 conversations with representatives of PRC or Roy
16 F. Weston relating to the alleged changes made
17 by ERM in the second draft as being important or
18 fairly significant?

19 A. Important in doing what?

20 MR. TENENBAUM: Objection, vague.

21 BY MR. FINCH:

22 Q. Important for any of the purposes that
23 you used the word important a moment ago?

24 A. No. I was talking in general. In that

1 specific situation, I thought it was important.

2 But, I don't know what you are
3 referring to, important in doing what?

4 Q. Important enough to make a memo of or
5 to keep notes on.

6 A. I still don't understand what you
7 consider is important.

8 MR. TENENBAUM: Was it important enough --

9 Do you take notes when it is important
10 enough to take notes?

11 MR. FINCH: That is circular.

12 Q. Why didn't you take notes of these
13 conversations.

14 MR. TENENBAUM: You haven't asked him if he
15 took notes of this conversation yet. You
16 haven't asked that yet.

17 BY MR. FINCH:

18 Q. Did you take notes?

19 A. I don't remember.

20 Q. Are there any documents or records
21 available to you that would refresh your memory?

22 A. I could go back and look at my file.

23 Q. Would these be files that you reviewed
24 in connection with the compilation of the

1 administrative record?

2 MR. TENENBAUM: Objection. I have to
3 instruct the witness not to answer.

4 How is it relevant to anything other
5 than -- that is a back way of asking about the
6 compilation of the record, it seems to me.

7 MR. FINCH: I don't care about the
8 compilation of the record on this point.

9 MR. TENENBAUM: Why do you care if they are
10 the same documents. He said files.

11 MR. FINCH: I am just trying to find out how
12 this witness maintained his files, so I can know
13 whether there were some specific files that he
14 never consulted in connection with the
15 preparation of the administrative record and,
16 therefore, by definition, would not be subject
17 to your objection or be prey to your
18 instructions not to answer.

19 MR. TENENBAUM: I have allowed him subject
20 to my objections to answer your questions about
21 whether he made the notes and so on. You don't
22 need to ask whether or not that is outside of
23 the record.

24

1 BY MR. FINCH:

2 Q. Do you know whether those notes are
3 still in existence?

4 A. I don't know whether they are.

5 Q. If any ever came into existence, would
6 they still be in existence?

7 A. Yes.

8 Q. Do you recall when the telephone
9 conversations with representatives of Roy Weston
10 or PRC took place?

11 A. Which telephone conversations?

12 Q. In relation to the alleged changes made
13 by ERM in the second draft.

14 A. - You mean regarding comments on the
15 second draft of the remedial investigation?

16 Q. That's right.

17 A. It would have been sometime prior to
18 submittal of our formal comments to ERM.

19 Q. It would be sometime before the end of
20 May 1987?

21 A. Yes, probably in around there.

22 They were probably -- you know, I am
23 always talking to the contractors about various
24 issues. There were conversations after that,

1 too.

2 Q. Do you recall who from Roy F. Weston
3 you spoke to regarding this matter?

4 A. Yes.

5 Q. Who was that?

6 A. I believe I talked to Kirk Stempson and
7 also to a girl who used to work there. I can't
8 think of her name.

9 Q. A girl?

10 A. Female. Yes.

11 Q. Who was the female?

12 A. I don't remember. I would have to look
13 at the file.

14 Q. So it was Mr. Stempson and a female
15 from R. F. Weston.

16 Who from PRC?

17 A. I believe the -- PRC wasn't involved in
18 reviewing the second draft.

19 Q. It was just R. F. Weston?

20 A. Right. I think there was Mike
21 Stapleton. I met with him.

22 Q. Mike Stapleton?

23 A. Yes.

24 Q. Also from R. F. Weston?

1 A. Yes.

2 Q. Do you recall roughly how many
3 telephone conversations you had with
4 representatives of R. F. Weston on the alleged
5 changes made by ERM in the second draft of the
6 RI?

7 A. No.

8 Q. Can you make a reasonable estimate of
9 the number of conversations?

10 A. No.

11 Q. Could it have been as many as
12 twenty-five?

13 A. I don't know.

14 Q. Could it has been as many as fifty?

15 A. I don't know.

16 Q. Could it be as few as five?

17 A. I don't know.

18 Q. Could it be as few as two?

19 A. I don't know.

20 Q. It could be anywhere from two to fifty
21 or more?

22 A. I said I don't know.

23 MR. TENENBAUM: He said he doesn't know.

24 MR. FINCH: He also just a moment ago said

1 yes.

2 Which is it, yes or I don't know?

3 A. Yes what? I never said yes to a
4 specific number. I don't know how many there
5 were.

6 Q. Do you recall the period of time that
7 these conversations took place over the
8 telephone?

9 A. I think I already told you that I was
10 probably corresponding with Weston throughout
11 that period.

12 Q. I am only focusing now on the alleged
13 changes made by ERM in the second draft of the
14 remedial investigation report. I am not asking
15 about other conversations you may have had with
16 this contractor regarding Midco.

17 Now, focusing on that limited subject
18 matter. Do you recall roughly how many
19 telephone conversations you had with R. F.
20 Weston representatives?

21 A. No.

22 Q. Your testimony would be the same as to
23 the number it could have been; you have no idea
24 whether it was two or whether it was fifty?

1 A. I wouldn't want to guess.

2 Q. Do you recall whether Mr. Stempson ever
3 told you that he thought that ERM was acting in
4 bad faith?

5 A. I think this whole acting in bad faith
6 is a word you have been using.

7 Q. That's sort of a yes or no question.
8 Mr. Boice, that is a yes or no question.

9 MR. TENENBAUM: Let me object to the
10 question to the extent that it doesn't define
11 what bad faith is.

12 Go ahead.

13 A. What does bad faith mean?

14 BY MR. FINCH:

15 Q. Do you recall whether Mr. Stempson ever
16 told you that he thought that ERM's performance
17 or actions were in any sense not honest or
18 dishonest?

19 A. I don't remember.

20 Q. Do you recall whether Mr. Stempson ever
21 told you that he thought that ERM's actions were
22 deceptive, or words similar to deceptive?

23 A. I don't remember.

24 Q. Did he ever use the phrase bad faith

1 with you in these phone conversations, in
2 reference to ERM's performance or actions?

3 A. No.

4 Q. Was there anything that Mr. Stempson
5 said to you that led you to form an impression
6 that ERM's performance with respect to the
7 second draft of the RI was not honest?

8 A. Would you repeat that question?

9 Q. Would THE reporter read it back,
10 please.

11 (The question was read.)

12 A. Any comments he provided?

13 Q. Yes.

14 A. Yes.

15 I think the comments from Weston, which
16 included his review, suggested that there wasn't
17 an honest attempt to meet the government's
18 requirements for an RIFS.

19 Q. Do you recall whether he used the
20 phrase honest attempt?

21 A. No.

22 Q. Do you recall whether anyone else
23 connected with R. F. Weston used the phrase
24 honest attempt?

1 A. No.

2 Q. Do you recall whether anyone other than
3 yourself has used the phrase honest attempt in
4 this regard?

5 A. No.

6 Q. Do you recall whether this is the first
7 time you have used the phrase honest attempt in
8 this regard?

9 MR. TENENBAUM: What do you mean by used?
10 You mean verbally spoke the words or in his
11 mind?

12 MR. FINCH: An expression orally, in
13 writing, use of language.

14 A. I believe at this meeting I suggested
15 that maybe there wasn't an honest attempt to
16 meet the requirements --

17 Q. What did you mean by honest attempt?

18 A. -- by them.

19 They gave me the impression that they
20 weren't trying to meet the Agency's
21 requirements. That is, one of the requirements
22 is to characterize the site. The impression I
23 got is they were trying to confuse the
24 information rather than organize it in a clear

1 formal manner.

2 Another was that there is a requirement
3 to evaluate and determine what risks exist at
4 the site. And the impression we got is that --
5 the impression I got is that they were trying to
6 minimize the risks rather than to identify the
7 risks from the site.

8 Q. Why do you use the phrase honest
9 attempt?

10 A. Well, basically it means they weren't
11 trying to meet our objectives. The objectives
12 set in the requirements of the consent decree
13 were spelled out in the consent decree and they
14 weren't following it.

15 They weren't, didn't -- they gave the
16 impression that they weren't trying to meet the
17 goal of the remedial investigation feasibility
18 study.

19 Q. Is it possible that they were trying to
20 meet those goals, but you did not understand the
21 reasons that they analyzed and assembled data
22 the way they did; is that a possibility?

23 A. I think I understood the reasons why
24 they assembled the data the way they did.

1 Q. And what were those reasons that you
2 think you understood?

3 A. They gave reasons in their responses.
4 But, overall my impression was the same, that
5 they weren't trying to meet the goals of the
6 Agency, and the goals, the requirements of the
7 consent decree.

8 Q. You have testified several times, Mr.
9 Boice, that this is an impression. I think you
10 have testified that you have not formed a
11 conclusion.

12 Is it your testimony that this is just
13 a subjective feeling on your part of --

14 A. No, I think it is more than a
15 subjective feeling.

16 Q. How is it more than a subjective
17 feeling?

18 A. It is based, backed up by information,
19 by the actual events that occurred during the
20 preparation of the RIFS.

21 Q. What information and what actual
22 events?

23 A. I think I already went over them
24 yesterday. There is always a lot more detail I

1 could go into.

2 Q. I am asking you for that detail.

3 A. If you want more detail, you can -- I
4 went over the general problems with the site.

5 If you want more detail on any specific
6 problems, I think I am willing to discuss that.
7 But, I don't think I can recite every detail
8 that we discussed in that.

9 Q. That is fair enough. Why don't you
10 break this down.

11 As to the elimination of data in the
12 second draft of the RI report, what led you to
13 believe that there was not an honest attempt on
14 the part of ERM to provide the information that
15 was legally obligated?

16 A. For one thing the -- okay. What do
17 you mean by legally obligated?

18 Q. Well, it has been your testimony that
19 you thought there wasn't an honest attempt to do
20 certain things ERM was supposed to do.

21 I am just trying to find a shorthand
22 way to describe what ERM was obligated to do in
23 the RI process. So I thought I would use the
24 phrase legally obligated, since that is a

1 shorthand way of saying that is what ERM was
2 supposed to do. That is what I mean by it.

3 You had expectations. You thought
4 there was not an honest attempt to meet those
5 expectations. Is that a more comfortable way
6 for me to express it for you?

7 A. Yes.

8 Q. Okay.

9 A. So what is the question?

10 Q. The question, which I will withdraw and
11 restate, is what as to the elimination of data
12 in the second draft of the RI report led you to
13 believe that there was not an honest attempt to
14 meet your expectations?

15 A. I think I already answered that before.

16 But, as I stated before, in the first
17 draft under the quality assurance project plan,
18 which was incorporated as a portion of the
19 consent decree, Geosciences was in charge of
20 validating -- collecting the data and validating
21 the data, determining which data was valid to
22 do.

23 They did that with USEPA's oversight in
24 an acceptable manner. And when ERM focused the

1 project, without consulting ERM or the Agency,
2 they removed a number, a significant amount of
3 the data from consideration in the risk
4 assessment.

5 Q. You referred to something, is that the
6 QAPP, you are referring to?

7 A. Quality assurance project plan.

8 Q. Known as the QAPP?

9 A. Right.

10 In other words, they weren't following
11 the agreements with the Agency to follow the
12 procedures of the quality assurance project
13 plan.

14 Q. How do you know they weren't doing
15 that?

16 A. Because they gave us a report of -- the
17 data that had been validated by Geosciences was
18 not used.

19 Q. You just testified that ERM was
20 supposed to gather these data with EPA
21 oversight?

22 A. No, I said Geosciences.

23 Q. Geosciences.

24 A. They don't gather it. The analyses are

1 conducted, they validate the data. They put it
2 in the report.

3 It is up to Geosciences to validate the
4 data under USEPA's oversight.

5 Q. Why was it up to Geosciences and not
6 ERM?

7 A. Because in the consent decree, it says
8 that the respondents had to follow the -- it
9 required that the participants complete the RIFS
10 in accordance with an EPA approved quality
11 assurance project plan.

12 That project plan was submitted by
13 Geosciences on behalf of the respondents and it
14 provided for data validation being conducted by
15 Geosciences.

16 Q. Was it your understanding that this
17 plan barred anybody other than Geosciences to
18 review the data collected by Geosciences, other
19 than EPA?

20 A. Well anyone can review it. But, as far
21 as preparing the final EPA approved report, the
22 data was to be reviewed or the validation was to
23 be conducted by Geosciences.

24 Q. What do you mean by validation?

1 A. After the data is generated by the
2 laboratory, it goes through some internal
3 quality assurance process. Then it goes through
4 an independent group, where the data is reviewed
5 against certain requirements to assure that the
6 data is valid for use in the project. It also
7 is to assign certain data qualifiers.

8 Q. If one were to call this a data
9 qualification process, is this to be done
10 entirely by Geosciences?

11 A. Yes, with oversight by USEPA.

12 Q. That is spelled out in a document in
13 this case?

14 A. In the USEPA approved quality assurance
15 project plan.

16 Q. So the QAPP said that Geosciences was
17 to work with EPA on data qualification?

18 A. Geosciences was to conduct the data
19 validation, in accordance with certain Agency
20 documents and procedures, and we were to provide
21 oversight of those, that process.

22 Q. Did the QAPP exclude ERM from any
23 participation in the data qualification or
24 validation process?

1 A. Well, it indicated that Geosciences was
2 going to conduct that data validation. It
3 didn't identify any other contractor to
4 participate in that process or to make a final
5 decision certainly on the data validation.

6 Q. I am not sure I heard your entire
7 response. Could the reporter please read it
8 back.

9 (The record was read.)

10 Was the QAPP silent on the role that
11 other contractors would play on data validation
12 or qualification?

13 A. Absolutely not. It identified
14 Geosciences as conducting the data validation.

15 Q. So, it is your understanding of the
16 QAPP that by so identifying Geosciences, the
17 QAPP excluded participation by any other
18 contractor?

19 MR. TENENBAUM: Objection.

20 You can answer.

21 A. Well, the QAPP, quality assurance
22 project plan, was incorporated in the consent
23 decree itself as part of the consent decree.

24 Therefore, those procedures were a part

1 of the consent decree and part of the agreement
2 that participants had with the Agency. That
3 provided for Geosciences to conduct the data
4 validation for the work to be done on the site.
5 And that was with USEPA's oversight.

6 Geosciences conducted the validation.
7 EPA conducted the oversight. We concluded that
8 Geosciences had conducted a validation in a
9 proper manner. Then ERM took over and they just
10 changed it. They changed the validation.

11 Q. You are getting way ahead of me.

12 MR. TENENBAUM: We are trying to expedite
13 this long series of questions.

14 MR. FINCH: The problem is that I am trying
15 to lay a proper foundation and build something
16 here. And I can't do it if the witness
17 leapfrogs beyond the question that I am asking.
18 Sometimes these things take time.

19 Q. You have testified it is your
20 understanding that the consent decree then
21 mandates that Geosciences and no other
22 contractor be involved in quality assurance,
23 excuse me, data qualification or data
24 validation?

1 MR. TENENBAUM: Objection.

2 A. I already answered the question

3 MR. FINCH: Well, I don't think you did.
4 Counsel, have you objected on an asked and
5 answered basis; is that one of the bases for
6 your objection?

7 MR. TENENBAUM: It wasn't what I had in
8 mind. I will have to think about whether it was
9 asked and answered.

10 Let's see. I don't know whether it was
11 or not. I have to go back and check.

12 MR. FINCH: All right. You don't know yet.
13 That's not a basis for your objection thus far.
14 So I think the witness can answer.

15 A. Can we reread my response?

16 Q. Can you reread the question, please?

17 A. No, my response.

18 Q. I don't want to hear your response. I
19 want to hear the question.

20 MR. TENENBAUM: Well, the witness feels that
21 he has answered it already. I don't think --

22 MR. FINCH: The witness is not representing
23 himself.

24 MR. TENENBAUM: I am representing the

1 witness, and he expressed -- he has requested to
2 hear what his last answer was.

3 MR. FINCH: All right. The last answer
4 probably will be more understandable if we know
5 the question.

6 MR. TENENBAUM: That is fine.

7 MR. FINCH: Fine.

8 Why don't we have the last question and
9 the last answer.

10 Let me save some time. I will withdraw
11 the question and I will concede that it was
12 asked and it was answered.

13 Q. Now, Mr. Boice, did you have any role
14 to play in the negotiation of the consent
15 decree?

16 A. The 1985 consent decree?

17 Q. Yes.

18 A. No.

19 Q. Do you know when the 1985 consent
20 decree was fully negotiated?

21 A. It was around June 1985.

22 I guess I did have a role now. I was
23 consulted on some things.

24 Q. Do you recall what you were consulted

1 on.

2 MR. TENENBAUM: By non-attorneys?

3 MR. FINCH: By non-attorneys.

4 A. Well, Geosciences called me to ask what
5 the quality assurance project plan requirements
6 would be.

7 Q. During the period that the consent
8 decree was being negotiated?

9 A. Yes.

10 Q. Someone from Geosciences called you and
11 asked what the QAPP would be?

12 A. Yes. And I helped finalize the
13 statement of work, which was attached. They
14 were attached as Exhibits B and C to the consent
15 decree.

16 Q. You helped finalize statements attached
17 as Exhibits B and C to the consent decree?

18 A. Yes.

19 Q. What did those Exhibits relate to, did
20 they relate to the QAPP?

21 A. Those are the statement of work for the
22 completion of the remedial investigation,
23 feasibility studies at each site. I am fairly
24 sure they mention the QAPP.

1 But, I am also fairly sure the consent
2 decree in the body of the decree itself said
3 something regarding the quality assurance
4 project plan.

5 Q. Did you have any role to play in the
6 negotiation of that language in the body of the
7 decree relating to the QAPP?

8 A. Negotiation?

9 MR. TENENBAUM: Objection.

10 BY MR. FINCH:

11 O. Other than communications with an
12 attorney. Did you have a role to play?

13 A. No.

14 Q. Was it your position that ERM had to
15 take the Geosciences data and incorporate it in
16 the RI without question?

17 A. Well, we met with them and we
18 determined that.

19 Q. That was who?

20 A. We met with Geosciences and ERM and our
21 own quality assurance people, and we determined
22 that Geosciences and ERM should meet, work out
23 their differences, then with oversight from are
24 own quality assurance personnel.

1 Q. When did this meeting take place?

2 A. This might have been the meeting we
3 referred to in May 1989.

4 Q. That ERM should meet with Geosciences
5 and work out its differences with Geosciences?

6 A. Yes.

7 In other words, ERM could provide their
8 comments to Geosciences. Geosciences would
9 review it and make the final decision on what
10 data should be in the remedial investigation.

11 MR. TENENBAUM: He said '89. Is that is the
12 year.

13 MR. FINCH: '87.

14 A. Oh. '87.

15 Q. And ERM participated in this meeting
16 because it had a role to play in assessing the
17 quality of the data that Geosciences gathered?

18 MR. TENENBAUM: Objection.

19 A. Well, we felt that they could play a
20 role.

21 BY MR. FINCH:

22 Q. What role did you feel they could play?

23 A. Just what I said. That they can
24 provide their comments to Geosciences.

1 Geosciences could review it and make a final
2 recommendation to EPA.

3 EPA would -- our quality assurance
4 people would review that, and if we went along
5 with it, then it was all right to do.

6 Q. Do you know whether ERM had any
7 communication with Geosciences prior to this
8 meeting regarding the data that ERM allegedly
9 thought to remove from the second draft of the
10 RI report?

11 A. I don't know, but it appeared that they
12 hadn't.

13 Q. Had not had any such communication?

14 A. That's how it appeared. Yes.

15 Q. How did it so appear?

16 A. Just based on the discussions that took
17 place.

18 Q. You say it appeared.

19 Did it appear to you or did it appear
20 to somebody else?

21 A. It appeared to me based on the
22 discussions that took place, and the memos that
23 went back and forth between.

24 Q. Was ERM supposed to be in contact with

1 Geosciences as Geosciences gathered and analyzed
2 these data?

3 A. What do you mean by gathered? You mean
4 in the data validation process?

5 O. That's correct.

6 A. No.

7 Q. Marshalled and analyzed these data?

8 A. No, ERM hadn't.

9 MR. TENENBAUM: What production at what
10 point in the process, before?

11 MR. FINCH: Before the meeting.

12 MR. TENENBAUM: At any time before the May
13 '87 meeting?

14 MR. FINCH: At any time before the meeting.

15 A. Was Geosciences supposed to do that,
16 was ERM supposed to do that under the consent
17 decree you mean or under the QAPP?

18 BY MR. FINCH:

19 Q. Under any governing document or
20 protocol.

21 A. No.

22 Q. Were they forbidden from doing such?

23 A. As I stated before, the consent decree
24 provided for implementation of the sampling and

1 the analyses in accordance with the quality
2 assurance project plan.

3 Quality assurance project plan
4 identified that Geosciences would conduct the
5 data validation.

6 Q. Do you recall what ERM's objections
7 were to the data validated or supposedly
8 validated by Geosciences?

9 A. They felt that some of the methyl ethyl
10 ketone and methylene chloride data was valid.

11 Q. Do you know why, why they thought so?

12 A. No. I would have to go back into the
13 record.

14 Q. You say you would have to go back in
15 the record?

16 A. Right.

17 A. It should have been questioned --

18 MR. TENENBAUM: Why don't we have the last
19 question and answer read back.

20 (The record was read.)

21 A. It should be invalid.

22 Because ERM thought that some of the
23 data, methyl ethyl ketone data and methylene
24 chloride data and some of the other data that

1 Geosciences had validated was invalid

2 BY MR. FINCH:

3 Q. Is it your testimony you don't recall
4 why ERM thought the data was invalid?

5 A. I don't remember off the top of my
6 head.

7 Q. Would it refresh your recollection if I
8 were to suggest to you that one of the reasons
9 ERM thought that the data was invalid was
10 because it did not reflect site-related
11 activities?

12 A. I don't remember that, no.

13 Q. All right.

14 Can we go off the record for a moment.

15 (Discussion had off the record.)

16 Back on the record, please.

17 Mr. Boice, I hand to you what has been
18 previously marked as Deposition Exhibit 8, which
19 purports to be a memorandum from Roy Ball to
20 Richard Boice, the Midco Technical Committee,
21 and Mr. Robert Aten, A-t-e-n, of Geosciences
22 dated June 2, 1987.

23 I will ask you, Mr. Boice, whether you
24 recall ever seeing this document before?

1 MR. TENENBAUM: Well, the questions -- I
2 don't really recall the exact questions that
3 were asked last time with respect to this
4 exhibit, but I don't recall that any of them
5 pertained to the issue that you are raising of
6 so-called good or bad faith.

7 As I stated before, I don't know that
8 that really is a relevant issue in the case,
9 necessarily. But, if you want to pursue that,
10 subject to my objections, I will let him answer
11 the question.

12 But, I am going to object to the extent
13 you are seeking discovery on any record issues,
14 or on any issue that turns out to be irrelevant.

15 MR. FINCH: At this point I am not seeking
16 discovery on a record issue, if there is such a
17 thing.

18 Q. Mr. Boice, does Exhibit 8 refresh your
19 recollection as to any of the reasons stated by
20 ERM for disagreeing with the data results
21 compiled by Geosciences in draft number 2 of the
22 RI report?

23 A. No.

24 This really doesn't provide any

1 information on the reasons why they didn't think
2 the data was -- certain data that Geosciences
3 had validated were not valid.

4 Q. That wasn't my question. I didn't ask
5 you whether the exhibit provided such
6 information. I asked you whether it refreshes
7 your recollection?

8 A. No.

9 Q. What was ERM's role in preparation of
10 the RIFS?

11 MR. TENENBAUM: Same continuing objection.

12 A. Well, I think the Midco Steering
13 Committee is aware of their role, as we are,
14 they were the ones that hired them.

15 But, my understanding of their role is
16 they were overall -- the contractor overall in
17 charge of completing the remedial investigation
18 feasibility study.

19 They were to pick up where Geosciences
20 was cut off in completing the remedial
21 investigation, rather than completing the --

22 Let's see, generally the data, except
23 for appendices in back which tabulated the data,
24 Geosciences did those. They did Chapter 5, the

1 data organization, and 6 on the risk assessment
2 and 7 on the preliminary direction of the
3 feasibility study.

4 Q. What you mean pick up?

5 A. Dames & Moore did the bulk of the
6 feasibility study, but they were kind of
7 overseeing it. And they did the indicator
8 chemical selection procedures and the ground
9 water modeling for the feasibility study and
10 also the ground water modeling for the remedial
11 investigation.

12 Q. They did all those things.

13 You said they picked up where
14 Geosciences left off. What do you mean by that?

15 A. I didn't say that they picked up where
16 Geosciences left off.

17 Q. Would the reporter read back the first
18 hundred words or so of the last response.

19 (The record was read.)

20 What did you mean by pick up where
21 Geosciences was cut off?

22 A. I meant that the apparently the Midco
23 trustees had cut off Geosciences' work at
24 some -- at that point.

1 And they wanted ERM to complete the
2 remedial investigation, except for Geosciences
3 continued to provide the additional sampling and
4 laboratory analyses and correcting the data
5 tabulation and the appendix.

6 Q. Isn't it true that ERM had overall
7 oversight responsibilities for preparation of
8 the entire RIFS under the partial consent
9 decree?

10 MR. TENENBAUM: Objection.

11 A. Under the partial consent decree, you
12 mean they were designated in the partial consent
13 decree?

14 BY MR. FINCH:

15 Q. Did ERM have a specific role, a
16 specific title in connection with the
17 preparation of the RIFS?

18 A. I don't know what you are -- I don't
19 understand your question.

20 Q. Was ERM a project coordinator?

21 A. I don't know.

22 Q. Do you know what a project coordinator
23 is?

24 A. I know what a project coordinator is,

1 yes.

2 Q. What is a project coordinator?

3 A. You asked the question. If you want to
4 ask me to answer it, you need to define what you
5 mean by project coordinator.

6 Q. No, I don't.

7 I said do you know what a project
8 coordinator is. You said yes.

9 MR. TENENBAUM: He wants your version of
10 what a project coordinator is. Tell him, if you
11 have one.

12 A. This is not -- an academic question,
13 what a project coordinator is.

14 BY MR. FINCH:

15 Q. Give me an academic answer.

16 MR. TENENBAUM: I will object to the
17 question, vague, ambiguous.

18 You can answer to the best of your
19 ability.

20 A. I assume there is a project. There is
21 something that needs to be done. And there's
22 coordination that needs to be done in completing
23 the project. So the coordinator would
24 coordinate the project.

1 BY MR. FINCH:

2 Q. Did you review the partial consent
3 decree before you formed your impression that
4 ERM's performance did not reflect an honest
5 attempt to meet your expectations?

6 A. Yes.

7 Q. Do you recall whether in that review of
8 the partial consent decree you examined its
9 provisions on a project coordinator?

10 A. I don't know.

11 Q. Was ERM the project coordinator for
12 purposes of preparation of the RIFS at the Midco
13 site?

14 MR. TENENBAUM: Same objection.

15 A. I believe Geosciences was designated as
16 project coordinator. That later ERM -- or when
17 the second draft of the RI came in by ERM, we
18 asked for information on ERM, so we could
19 approve them or accept them, I guess, in that
20 role as project coordinator.

21 BY MR. FINCH:

22 Q. But it is your recollection that at
23 some point Geosciences was a project
24 coordinator?

1 A. They were designated as a project
2 coordinator.

3 Q. Who designated them?

4 A. The Midco trustees.

5 Q. Do you know what a project coordinator
6 was supposed to do?

7 A. I would have to look at the decree to
8 refresh my memory. But, I think I said that he
9 is overall in charge of completing the remedial
10 investigation feasibility study.

11 Q. The purpose of a QAPP is to assure the
12 quality of certain data, isn't that true?

13 A. To assure the quality of all
14 measurements conducted for completing the
15 remedial investigation.

16 Q. Wasn't it ERM's responsibility to make
17 sure that the data generated through the QAPP
18 was relevant to the RI and the subsequent FS?

19 MR. TENENBAUM: Same objection.

20 A. All validated data should be used in
21 the RIFS.

22 BY MR. FINCH:

23 Q. Even if it is not relevant to the RIFS?

24 A. I don't understand what you mean by

1 relevant.

2 Q. If it doesn't relate to on-site
3 activities, is it relevant to the RIFS?

4 MR. TENENBAUM: Object, vague.

5 A. The remedial investigation is to
6 evaluate all site risks or on-site risks,
7 whether it is from the Midco operations or not.

8 BY MR. FINCH:

9 Q. What if it is not an on-site risk?

10 A. I don't understand your question.

11 Q. Data that does not reflect an on-site
12 risk, is it relevant to the RI or the FS?

13 A. Yes. If it may have proceeded from the
14 site.

15 Q. So relevant data either reflects an
16 on-site risk or proceeds from the site; is that
17 correct?

18 MR. TENENBAUM: Same continuing objection.

19 A. Could you repeat that?

20 BY MR. FINCH:

21 Q. The reporter will read the question
22 back.

23 (The record was read.)

24 A. I don't know what you mean by relevant

1 data.

2 O. Isn't it possible for a QAPP to include
3 data that upon reflection and investigation is
4 not relevant to the purposes of the RIFS, isn't
5 that possible?

6 MR. TENENBAUM: Same objection.

7 A. Under the consent decree, the consent
8 decree included Exhibits B and C, which included
9 a statement of work for each site.

10 All the data collected under those
11 exhibits, in accordance with those statements of
12 work, were to be validated by Geosciences
13 Research Associates in accordance with the
14 approved QAPP.

15 BY MR. FINCH:

16 Q. Validated for purposes of quality
17 assurance, isn't that correct?

18 A. Right.

19 And all validated data was to be used
20 in the remedial investigation report, including
21 the risk assessment.

22 Q. Even if the data were not relevant to
23 purposes of the remedial investigation report?

24 MR. TENENBAUM: Objection.

1 A. All the date is relevant.

2 BY MR. FINCH:

3 Q. How do you know it was relevant?

4 MR. TENENBAUM: Same objection.

5 BY MR. FINCH:

6 Q. Let me withdraw that.

7 How did Geosciences know it was
8 relevant?

9 MR. TENENBAUM: Same objection. Objection
10 to the form.

11 A. As I stated before, before the project
12 started, the Midco Steering Committee agreed to
13 conduct the remedial investigation in accordance
14 with a statement of work prepared by USEPA.
15 That included comments from, it was prepared
16 largely by CH2M Hill, which was input from
17 experts from the -- employed by the Agency.

18 And that determined the extent of study
19 at the minimum, at least the initial phase of
20 study that needed to be done on the site.

21 The Midco Steering Committee agreed to
22 implement the remedial investigation in
23 accordance with that statement of work, and that
24 included preparing a quality assurance project

1 plan and implementing the work in accordance
2 with the approved -- the quality assurance
3 project plan as approved by USEPA. That
4 included conducting the -- Geosciences
5 conducting the data validation.

6 BY MR. FINCH:

7 O. So, it is your position that the Midco
8 Steering Committee had agreed to include
9 Geosciences' QAPP approved data without any
10 inquiry as to whether that data was relevant
11 to --

12 MR. TENENBAUM: Same objection.

13 BY MR. FINCH:

14 Q. -- to the RI or FS?

15 A. Well, the statements of work themselves
16 determined the extent of sampling necessary that
17 we felt was relevant to the RIFS.

18 Q. Who is "we"?

19 A. The Agency and the Midco Steering
20 Committee agreed -- apparently agreed to that,
21 because they agreed to implement the study in
22 accordance with USEPA's statement of work.

23 Q. What do you mean "apparently agreed"?

24 A. You signed the consent decree. The

1 defendants signed the consent decree with USEPA
2 and agreed to implement the remedial action, the
3 RIFS in accordance with the statements of work
4 prepared by USEPA.

5 Q. So, it was your understanding at the
6 time that you formed this impression of a lack
7 of an honest attempt to meet your expectations,
8 that the Midco Steering Committee had agreed not
9 to challenge any of the data generated by
10 Geosciences for any reason?

11 MR. TENENBAUM: I will let him answer, but
12 let me note that this phrase, "your
13 expectations," is a phrase that originates with
14 you, not with the witness.

15 MR. FINCH: You can note that, Alan, but we
16 had a colloquy in the record in which the
17 witness embraced that phrase as a fair statement
18 of the point he was trying to get across in his
19 testimony.

20 MR. TENENBAUM: I think the witness' own
21 words speak better than your rephrasing of them.

22 MR. FINCH: It was a shorthand way. If you
23 want me to go back and repeat.

24 MR. TENENBAUM: I just wanted to note for

1 the record that those were your words
2 originally.

3 MR. FINCH: They were words embraced and
4 endorsed by the witness and they are as much his
5 testimony as words that he originated.

6 MR. TENENBAUM: Well --

7 A. I think I was saying not my
8 expectations, the requirements of the consent
9 decree, and the requirements of USEPA guidance
10 documents.

11 BY MR. FINCH:

12 Q. I don't think you want to say that, Mr.
13 Boice. Because, if you do, your counsel is
14 going to object, you are giving a legal
15 conclusion.

16 So why don't we keep it within the
17 confines of your knowledge and your
18 expectations.

19 If you want to go and say that you are
20 dealing with the meaning of the consent decree,
21 then fine. I will be happy to do it that way.

22 Which do you prefer, Alan?

23 MR. TENENBAUM: I prefer to do whatever the
24 witness wants to do. But, of course, I am not

1 going to allow you --

2 I am going to object to any questions
3 asking for legal conclusions.

4 Why don't we get the last question read
5 back and you can answer it to the best of your
6 ability.

7 (The question was read.)

8 You may answer, subject to the
9 objection.

10 A. As I stated before, the consent decree
11 which was entered into by the defendants stated
12 that the remedial investigation feasibility
13 study would be conducted in accordance with the
14 statements of work prepared by USEPA, and
15 incorporated into the consent decree as Exhibits
16 B and C.

17 The consent decree also provided for
18 conducting the sampling and the analyses in
19 accordance with a quality assurance plan,
20 quality assurance project plan, approved by
21 USEPA.

22 BY MR. FINCH:

23 Q. Isn't it true that ERM thought that
24 some of the data generated by Geosciences did

1 not relate to on-site activity or activity
2 emanating from on-site activities and,
3 therefore, wasn't relevant to the RIFS?

4 A. I don't remember that argument.

5 Q. Isn't it true that at the time ERM
6 engaged in the performance to which you have
7 alluded, and which left you with an impression
8 of bad faith, that ERM had overall oversight
9 responsibilities for conduct of the RIFS at the
10 Midco sites?

11 MR. TENENBAUM: Same standing objection.

12 BY MR. FINCH:

13 Q. Isn't that true?

14 A. Did the Midco Steering Committee
15 designate them at that time? I don't know.

16 MR. TENENBAUM: We have already gone through
17 this. He answered this before.

18 If you have the documents which have
19 the timing, you can mark them. He has already
20 answered that.

21 BY MR. FINCH:

22 Q. Did ERM make any attempt to hide the
23 fact that they were objecting to certain data
24 generated by Geosciences in the second draft of

1 the RI report?

2 A. Well, they didn't highlight it.

3 Since it was important data, I would
4 have expected someone to highlight something,
5 some important change between the first draft
6 and the second change.

7 It wasn't requested --

8 Q. What do you mean --

9 A. -- in the comments by USEPA.

10 Q. What do you mean by highlight?

11 A. Emphasis or bring, summarize in some
12 statement to the Agency, we are doing this and
13 this is why we are doing it.

14 Q. They didn't tell you what they were
15 doing or why they were doing it?

16 A. No.

17 MR. TENENBAUM: At what time? At the time
18 of the submission of the second draft?

19 BY MR. FINCH:

20 Q. At the time of the submission of the
21 second draft?

22 A. No.

23 Q. There was nothing in reviewing the
24 second draft that made clear that the data was

1 omitted?

2 A. If you read it closely, you could
3 figure it out. Yes.

4 Q. You testified the omission was noted by
5 R. F. Weston?

6 A. Yes. It was noted by Weston and I
7 noticed it too, of course.

8 Q. Did you notice it upon first reading
9 the draft?

10 A. I don't remember.

11 Q. Is it your testimony that the failure
12 to highlight this omission was a performance
13 leaving an impression of bad faith?

14 MR. TENENBAUM: Same objection to that
15 question.

16 A. As I think I already indicated, it had
17 an effect on my impression.

18 BY MR. FINCH:

19 Q. Were you in contact with ERM during the
20 period of time that the second draft of the RI
21 was being prepared?

22 A. No. We weren't notified that there
23 would be any change in the contract.

24 Q. Pardon me?

1 A. We weren't notified that there would be
2 any change in contractors.

3 Q. Contract with whom?

4 A. That the Midco trustees would change
5 contractors from Geosciences to ERM.

6 Q. When did you first learn that ERM
7 supposedly replaced Geosciences?

8 A. I believe it was when we received the
9 second draft of the remedial investigation.

10 Q. Is it your position that the Midco
11 trustees had no right to change contractors?

12 MR. TENENBAUM: Objection. Calls for a
13 legal conclusion.

14 If you know the answer, you can answer.

15 A. Well, we didn't prevent you from doing
16 it.

17 BY MR. FINCH:

18 Q. Who is "we"?

19 A. I should say the USEPA did not prevent
20 you from doing that.

21 Q. Why didn't you prevent the Midco
22 Steering Committee from doing it?

23 MR. TENENBAUM: Same objection.

24 A. I don't know.

1 BY MR. FINCH:

2 Q. I want to be clear I understand you,
3 Mr. Boice.

4 You are saying the first time you
5 learned that ERM had replaced Geosciences is
6 when you received the second draft of the RI
7 report?

8 MR. TENENBAUM: Without reviewing any
9 documents in order to refresh his recollection?

10 MR. FINCH: Yes.

11 A. I think I might have gotten a call
12 before then.

13 Q. Shortly before then?

14 A. From Art Schlessinger.

15 Q. Art Schlessinger.

16 Who is Art Schlessinger for the record?

17 A. He was a member of the Midco trustees.
18 He worked for Morton Thiokol.

19 Q. Which is a party in this case?

20 A. They are a PRP, yes.

21 Q. Had you ever met Roy Ball prior to the
22 time that you learned that ERM was supposedly
23 replacing Geosciences?

24 A. No.

1 Q. When was the first time you met Roy
2 Ball?

3 A. In our first meeting on the second
4 draft of the Midco I remedial investigation.

5 Q. That was the meeting in late May 1987?

6 A. Probably.

7 Q. You have also testified that you formed
8 an impression of bad faith from changes in the
9 risk assessment data in the second draft of the
10 RI report.

11 A. You mean risk assessment assumptions?

12 Q. Assumptions.

13 MR. TENENBAUM: Off the record for a second.

14 (Discussion had off the record.)

15 MR. FINCH: To memorialize an off-the-record
16 conversation, I have told counsel for the United
17 States that we have a substantial amount of
18 questioning left in our portion of this
19 deposition.

20 I am very reluctant to estimate the
21 exact amount of time, but it would be imprudent
22 of me to suggest any period of time less than
23 two days, and it may exceed that.

24 We are willing to continue this

1 deposition without setting a date for further
2 questioning, with the understanding that we will
3 be permitted to complete our questioning prior
4 to the discovery cut off.

5 If that is acceptable to counsel, it is
6 acceptable to us.

7 MR. TENENBAUM: Well, as I indicated off the
8 record, I am going to be giving you a call
9 Monday to discuss your needs for continued
10 deposition and our needs for scheduling
11 depositions, resolving stipulations and so on,
12 and we will try and meet everybody's needs on
13 Monday.

14 I am certainly not going to prevent the
15 reopening of a deposition. I certainly reserve
16 whatever rights we have, if this deposition goes
17 into days five, six, seven and eight. But, I am
18 certainly not saying we won't start up a
19 deposition on whatever date we agree upon on
20 Monday.

21 MR. FINCH: I will take that as a good faith
22 statement. I am a little concerned about the
23 phrase reopening of the deposition.

24 This deposition is not closing, and it

1 is still open.

2 MR. TENENBAUM: I didn't mean to suggest it
3 was closing.

4 MR. FINCH: All right. I will interpret
5 your comment, Alan, as suggesting you will not
6 try to impede our efforts to complete the
7 questioning we have begun and questioning on
8 other relevant subject matter areas to which you
9 have no other objections.

10 MR. TENENBAUM: I am not waiving any of my
11 objections.

12 MR. FINCH: You don't have to waive them.

13 MR. TENENBAUM: Or my rights to instruct not
14 to answer, but we will meet again.

15 MR. FINCH: All right. That is fine.

16

17 (Whereupon the deposition was
18 continued sine die.)

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